THE

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SELF-CRIMINATION — OPTION OF JURY TRIAL.

THERE are many provisions of this bill,[1] some of them very important, to which it should seem that little or no opposition will be offered. Of this description are the amendments of the law respecting evidence of handwriting, contradiction of witnesses, crown costs, payment of money into court, change of the venue in criminal cases, payment of costs upon acquittal, and perhaps above all, the completion of the great change of the law by the Act of 1851 for the examination of parties, by repealing the exception then introduced of husband and wife, and by rendering them admissible witnesses for or against each other, but at the same time placing their mutual communications during coverture on the footing of confidential communications. This has already been introduced into the Act for extending to Scotland the English Act of 1851. Upon all these provisions we shall for the present offer no remarks; but proceed at once to the controverted parts of the bill, viz. 1, the provisions respecting self-crimination; and 2, those respecting the option of trial by judge or by jury.

1. In entering upon this subject, — one of the most important which have come before us since we began our labors, — we must first of all remove the prejudice occasioned by a great misconception — the confounding two things entirely different, and which ought carefully to be

[1] A Bill entitled "An Act for the further amending the Law touching Evidence and Procedure." House of Lords, 1853 This article is taken from the London Law Review for May, 1853.

kept distinct—the case of a party on his trial for an offence, and that of a witness in a trial, whether civil or criminal. No one has ever proposed to adopt the French law, which subjects defendants to interrogatory as part of the proceedings against them: no one at least since Lord Denman's most able and most conclusive argument on this subject. But he gave no opinion whatever in favor of the protection afforded to witnesses, and with that alone we have now to deal. The question is, not whether a person on his trial shall be compellable to answer questions which may lead to his conviction, or indeed any questions at all; but whether a person called to give evidence between other parties, or himself being a party in a civil suit, and either called by his adversary or tendering himself as a witness, shall be obliged to answer questions, when his answers may either be an admission of guilt, or may give information whereby his guilt may be established in some other proceeding. It is proposed that what he says shall not be admissible in evidence upon any other proceeding, except a prosecution for perjury if he have sworn falsely; but that as a witness he shall no longer have the protection now given, and which we must before going further describe.

It is manifest that to be consistent with itself the law must needs make the witness the sole judge of the tendency of his answers. If it is intended to protect him, he must be allowed, without giving any particulars, to declare that if he answers the question he considers he will be exposed to a risk. If he can be asked in what way the risk will arise, what it is that he apprehends, and why, he must disclose the very things he fears may lead to his conviction. At one time there were conflicting decisions on this point; some judges held that the court must determine whether or not the witness could safely answer; and it was more than once said, that if he answered at all, he must go on and answer every question put upon the matter. But Lord Eldon authoritatively laid down the rule that the witness alone is to decide; that he may stop short wherever he pleases; and indeed, it is strange that any doubt should ever have been entertained upon this point, for nothing can be more plain than that the risk which the witness runs may never arise till a certain point of the examination, or, if it has arisen, may never have occurred to his mind. A late case in the Common Pleas, accordingly, has recognised in the most unqualified terms the

principle that the witness alone is to decide, and the judges have gone so far as to affirm that every question put to him must be understood to have this preface, "Answer only if you consider that you expose yourself to no risk."

It has, indeed, been held that the witness is bound to state what the charge is which he apprehends his answer may expose him to; and upon this an argument is raised, first, that this is a check upon him, inasmuch as to avoid giving evidence in the cause he must expose himself to the disgrace of being suspected to have committed an offence; next, that it prevents him from avoiding to answer by a simple assertion of danger, amounting to a mere refusal to give any evidence at all. But it is evident both that he may put his refusal upon the ground of some supposed charge attended with no disgrace, as riot, or things liable to sentence of the Spiritual Court, and also that he may evade the supposed rule by suggesting some such apprehension. But is there any such rule? Can there be any such if the protection really exists? "Were you present at such a time and place?" "I refuse to answer." "Why?" "Because I may thereby furnish the means of proving an offence to have been committed by me." "What offence?" Now it is clear that if he answers this question, he has all but admitted the offence, and has altogether furnished the means of proving it against him. Therefore he cannot be compelled to answer it. But if not, he at once escapes the obligation to give his evidence, and escapes not by the statement of a fact, but an opinion; a statement upon which, however false, no perjury can be successfully assigned. Consequently he escapes giving evidence without incurring any risk of punishment; and as he has mentioned no offence, he may, though credited to the full extent of his deposition, have only been suspected of the most venial misconduct, and thus he may escape giving evidence without incurring any disgrace. Wherefore he has been, by the rule of law, enabled to escape from the duty of giving his evidence, — one of the duties imposed upon him by another rule of law, — and escapes absolutely without any let, hindrance, or penalty whatever.

We have been considering the effects of the principle in sheltering an unwilling witness, unwilling from favor towards one party, or from interest in the cause, or it may be, under the new law, the party himself. But in the

more ordinary case of the witness having no such bias, the impediment to inquiry, the obstruction to justice, is very great, and in various ways the principle prevents truth from being arrived at and justice done, and also causes falsehood, and consequent injustice to prevail. That the truth is often concealed must be manifest, because the investigation is stopped by something wholly collateral to the question, and foreign to it. The court has a right, and the parties have a right, to the discovery of the whole circumstances which bear upon the matter in issue. If any person is in possession of information which can throw light upon these circumstances, provided he has it of his own knowledge, the court and the parties have a right to that information. It may be against the person's interest to give it; he may be a loser by the disclosures; he may be ruined in his fortune by it. The law says he still must give it. He happens to have been present when those things were done respecting which the inquiry is pending, or to have learned them from one of the parties to that inquiry, and by law he is bound to disclose them, however injurious, — nay, however ruinous to himself the disclosure may be. He is moreover bound to answer all questions touching his credit, except only those which most of all go to testing his credit; and bound to answer them, however much he may be disgraced or degraded by his answers; for we take it to be now clear that the notion is exploded which at one time prevailed to the contrary — a notion utterly inconsistent with the rule always maintained — that there was no protection against questions imputing even the gravest offences, provided by pardon or acquittal, or otherwise there could be no prosecution for them. Can there be then the least consistency in retaining the only exception which now exists, that of questions tending to crimination? The witness must answer, though he shall be made a bankrupt by confessing an act of bankruptcy, or insolvent by admitting a debt, or utterly ruined by the loss of his estate both real and personal by disclosing circumstances which prove him illegitimate; but he cannot be called upon to answer if he shall be exposed to a prosecution for a five pound penalty, or for some misdemeanor which would only be punished by a shilling fine.

We have said that the road to truth and justice is thus stopped up; and that the road to falsehood and injustice is also thrown open; and observe how the rule operates. A

witness is produced, it may be in a criminal case, to swear away the life or the reputation of the defendant; that witness may be the most infamous of mankind, and yet he may never have been convicted, or the record of his conviction may not be forthcoming; and yet were he to deny having committed some felony, or swindling, or other offence charged in the question put, there may be present a person who had direct knowledge from having seen it or heard him admit it. But he is not to be asked the question, and his evidence goes to the conviction of an innocent man. The innocent is sacrificed that the guilty may escape; for the ground of the rule is, that if the question is answered it may enable a prosecutor to obtain evidence which would convict the witness. Surely so gross an anomaly cannot be suffered any longer to disfigure our law.

The advantage of removing obstacles to the investigation of truth, and preventing falsehood from prevailing, is the direct gain which the proposed alteration of the law would give. The loss which we should incur appears to be only an additional gain. It is said that if the witness is compelled to answer, he may furnish the means of his own conviction. The supposition, therefore, is, that he has committed the offence respecting which he is interrogated. The mischief apprehended is, that he may be punished for it. Is that a loss or a gain to the administration of justice? We apprehend that this alleged loss is only an incidental gain.

It has been said that, were the rule of law altered, advantage might be taken of the compulsion of a witness, by calling him for the purpose of making him disclose circumstances which would give a clue to the prosecutor, and enable him to convict. But the risk (not a very great one, we must admit,) of such an abuse would be completely avoided by vesting in the court a discretion which all who favor the change in the law must needs contemplate as necessary,—the discretion of stopping all irrelevant inquiries — all questions directed to other matters than the matter in issue — all questions which do not go either to the merits of the cause, or to the credit of the witness, — and, within the scope of the same principle, even all questions which go to the witness's credit, if that credit is immaterial to the cause because of his testimony having been itself immaterial. This discretion will, therefore,

prevent any examination of the witness, either for the mere purpose of aiding a prosecution against him, or for the mere purpose of working his disgrace or wounding his feelings; but it will allow the examination if it is required for the discovery of truth material to the cause, notwithstanding that the collateral effect of such examination may be either to place the witness in jeopardy of being convicted of some offence which he has committed, or to work his disgrace, or to wound his feelings. Those injuries to him are not a ground for preventing his testimony being fully given when the trial of the cause requires it; but they are a sufficient ground for preventing his examination when it is irrelevant to the merits of the cause. He is a witness in the cause, and for the purposes of the cause, and for those purposes alone. Therefore he is not to be examined for the purpose of working his conviction or his disgrace. But if, in serving the purposes of the cause, his punishment or disgrace follows for an offence which he has committed, the ends of criminal justice are incidentally furthered by the same process of which the main and direct object was to further the ends of civil justice; and so far from any harm being done, a good is incidentally the result, though it was not in contemplation.

The principal objection made to the proposed change is, that the witness is said to be placed in the hard position of either confessing his guilt, or forswearing himself to conceal it; — either disclosing circumstances which may lead to his conviction, or withholding them by perjury. And we will at once admit that in cases where the offence imputed by the question is heinous, or where the circumstances sought to be disclosed would lead to the conviction of such an offence, the risk of perjury would be great. But there are several considerations which must be taken into the account, and which seem entirely to destroy the force of this objection.

In the *first* place, practically, the instances are extremely rare in which a witness is sought to be discredited by the imputation of crimes for which he would be punished, if convicted, more severely than for perjury.

Secondly. The instances are extremely rare in which the witness's guilt is not known to others, though these may not be forthcoming at the trial.

Thirdly. The instances are still more rare in which his examination, confined to matters strictly relevant to the

cause, would lead to the disclosure of circumstances dangerous to him if put on his defence.

Fourthly. The fact of the party being able to put the question, shows, that if those circumstances are not known to others as well as to the witness himself, at least others have some clue by which to trace them, independently of him.

Fifthly. The frequent recourse of witnesses to the protection of the rule of law, shows that they are unwilling to perjure themselves, else they might stop all inquiry and avoid all discredit, by at once denying the matter imputed.

Lastly. Against the supposed increase of perjury apprehended from withdrawing the protection, is to be set the undoubted tendency to encourage perjury, if not legal, yet certainly moral, by inducing witnesses to refuse answering questions, because they swear that the answer would expose them to risk, when they are perfectly assured that they would run no risk whatever.

We have pointed out the gross inconsistency of the law respecting self-conviction in several important particulars. The course of our legislation is marked by as great inconsistency; that is, by frequent departures from the principle, supposed to be universal, of protecting witnesses. We shall now mention a few examples, quite sufficient to show a distrust of the soundness of the foundation upon which the rule is built.

1. When it has been deemed expedient to institute a searching inquiry into abuses, the obstruction offered by the rule being felt as frustrating the investigation, the legislature has once and again suspended the rule altogether. The latest instance of this is the Act to appoint Commissioners for inquiring into the alleged corruption practised at elections for St. Albans. A provision was introduced, depriving witnesses of the protection in question, but saving them from prosecution for offences confessed by them, if the commissioners certified that they had truly answered the questions put.

2. The general Act for issuing commissions upon a joint address of the two Houses, to inquire into corruption reported by any committee of the Commons, contains a similar provision; but it also compels the disclosure of confidential communications.

3. The whole Bankrupt Law proceeds upon a refusal to admit the rule at all. Not only may the bankrupt himself

be examined touching offences committed by him, and which till within a few years were capital, and are now punishable by transportation for life; but all persons indebted to his estate, or suspected of having received part of it, and of being accessary to his offences, are liable to be examined, and cannot refuse to answer on the ground of self-crimination. Indeed, the bankrupt law appears of itself to afford quite a sufficient reason for abolishing the rule altogether. Nothing can be more absurd than maintaining any rule when so very large an exception is daily made to it.

The first two examples of the inconsistency suggest one of the qualifications which have been proposed, as those under which the abrogation of the rule should take place. Protect the witness, it is said, from all prosecution, if he has been examined upon the subject, and this will induce him to make a full disclosure. We do not consider this as the fit course to pursue. Such an immunity would be liable to very great abuse. Offenders against whom there existed ample evidence without their own confession, might obtain impunity by getting themselves called as witnesses. Nor can any discretion be properly lodged in the court as to whether or not a full disclosure has been made. The court could only judge by the demeanor of the witness, which might be a very fallacious test; for any other evidence might or might not exist in the cause; so that the certificate would be granted or refused upon grounds which mere accident alone might make sufficient or insufficient. The only qualification which can be safely added to the repeal of the rule, is that contained in the bill, that no answer given by the witness or party, whether at law or in equity, shall be given in evidence against him upon any prosecution or other proceeding of a criminal nature, save only on an indictment for perjury assigned upon his answer, and that the court shall determine in all cases upon the relevancy of the question to the matter in issue.

We have given no instances of the mischiefs arising from the rule; because its tendency to defeat judicial inquiries in various ways is too obvious to require illustration from instances. The most common case is perhaps the most striking of any; the injustice wrought by a witness, passing for respectable, who nevertheless is utterly worthless, and who having availed himself of the protection afforded by the rule, leaves it perfectly uncertain whether he seeks its

shelter for a venial or a grave delinquency. But there are some cases which the books record, and which show in a remarkable manner what unexpected consequences may result from an evil principle once firmly established, consequences which those who first laid it down never could have foreseen, and would have stoutly alleged to be fancifully suggested and to be wholly impossible. In one case a party had recovered a verdict in ejectment, and brought his bill against one who with notice of his title had purchased from the defendant in that ejectment. A statute of Henry VIII., prohibiting under a penalty the buying of controverted rights to land, was pleaded as the excuse for refusing to answer the bill, and the rightful owner was thus defeated by a party who held the title-deeds wrongfully, but was protected because he had been guilty of a breach of the old statute.[1] In another case a party was protected from answering, and therefore from giving up money to which he had no right, on the ground that he had been engaged in buying and selling offices, against the Act 49 Geo. 3.[2] But perhaps the case of *Brownsword* v. *Edwards*[3] is the most remarkable instance that can be cited. The defendant was asked if she had intermarried with the plaintiff's father; and she refused because he had formerly married her sister, and it was considered that a suit for incest in the spiritual court might be instituted if she admitted her own marriage. So that here the party who was entitled to her evidence, and for want of it possibly lost his estate, was injured for the sake of protecting a person who had committed incest. And in passing, we may observe, that in two at least of the three instances given, nothing could be more chimerical than the alleged apprehension of prosecution. Proceedings against one for marrying a deceased sister's husband, or against one for purchasing controverted real rights, were never, we will venture to say, heard of, and were not really believed to be hanging over their heads by the persons who falsely pretended to have such alarms. Beside the breach of law which they admitted by their refusal to answer, they were morally guilty of false swearing, although they made their deposition in perfect safety from all legal consequences, defeated parties

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[1] *Sharp* v. *Evans*, (3 P. W. 375.)
[2] *Westropp* v. *Benson*, (Cor. Leach, V. C., 1822.)
[3] 2 Ves. Sen. 243.

rightfully entitled to the benefit of their answers, and gave the advantage to the opposite party who was a wrong-doer. We believe that any further illustration is superfluous on a matter which only requires being attentively considered, to appear clear and undeniable.

We have, in discussing this question, assumed that the law is clear on some points upon which, however, there have been great fluctuations of opinion in the courts; for instance, as to the protection extending to questions that impute no offence, but tend to disgrace or degradation, — as to how far a witness can stop after once beginning to answer, and not at first availing himself of the rule. On these and other points there are conflicting decisions, and the law ought certainly to be declared even if it be deemed inexpedient to alter it. But we would most reluctantly acquiesce in the belief that such will be the opinion of the legislature, and therefore we trust no declaratory enactment will be required.[1]

2. The other controverted subject in this bill relates to procedure, and not to evidence; and it is of great importance. The experience of the county courts has thrown light upon many parts of our judicial system, and among others upon the office of jurors. In all cases where the matter in dispute, whether of debt or damages, exceeds five pounds, either party has the option of trying by a jury; and consequently, unless both parties are agreed that the judge alone shall try the cause, without a jury, he cannot try it. Now it is found that in not more than between two or three per cent. of all these causes have the party preferred trying by a jury. In more than ninety-seven cases out of every hundred, both parties have preferred taking the opinion of the judge and abiding by it. Nor has it been found that this average depends upon the amount of the matter in dispute. There is nearly the same proportion of jury trials in the smaller as in the more considerable cases. Indeed, it appears not to vary much with the nature of the dispute. There are about the same proportion in cases of tort as in those of debt and contract. The ques-

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[1] Lord Brougham has noted in the margin of the bill the cases which show the conflict. But those which we have cited as illustrating the consequences of the rule, as well as Lord Eldon's decision in that of *ex-parte* Cossens *re* Worrel, (1 Buck,) we have taken, not from the bill, but from a paper upon the subject, (7 L. R. 19,) which well deserves the attention of our readers.

tion, then, naturally arises, why should not the same option be given to parties in the superior courts, of taking the judge's opinion rather than a juror's?

It cannot be doubted that some cases are better adapted to trial by jury than by a single judge. Where damages are to be assessed, there is a manifest advantage in having the concurring judgment of several minds, of different habits of thinking and of feeling. The determination of a single mind is not likely to prove so satisfactory. Accordingly we believe the instances are exceedingly rare of any new trial being granted in respect of the damages awarded exceeding or falling short of what the judge deemed reasonable. If the option is given as the bill proposes, this consideration might possibly afford a ground for confining it to cases of debt and contract, and excluding cases of tort; but even with respect to torts, we cannot perceive what mischief would arise from leaving the parties themselves to select that tribunal which they consider most competent to do justice between them. Other cases of unliquidated damages, as on a *quantum meruit*, or injuries to property, depending upon evidence, seem as well fitted for the decision of a single judge as cases of liquidated damages. It has frequently been affirmed that where there is a conflict of evidence, the discussion by various minds leads more certainly to the truth than if a single mind alone weighs the opposite proofs. Much may no doubt depend upon the persons of whom the jury is composed, but taken as a general position it seems untenable, both because the opinion entertained by an experienced judge, — he who has passed his life in examining questions of fact as well as of law, who has had repeated occasion to compare the circumstances that seem in conflict, has seen the demeanor of witnesses, and ascertained how far their testimony is to be weighed against the probabilities of the case, — seems a far safer guide than the conclusion come to by inexperienced men, and also because part of the evidence, that which is written, is always to be interpreted by the judge alone. We of course do not deny that in questions respecting matters peculiarly within the knowledge of a special jury, as mercantile causes, their assistance is valuable; we are speaking of the ordinary run of cases, and of common juries.

The advantages of giving parties the option are numerous and important. First, they may greatly prefer the

opinion of a perfectly impartial, an able, and an experienced man; and it is to be observed, that the course of the law justifies such a preference, for where the judge is dissatisfied with the verdict, a new trial is granted of course. This shows that the law reposes confidence in his opinion more than in the jury's. But the error of the jury is a heavy expense to the suitor.

Next, the judge may feel that he would have come to a different conclusion, and yet may not choose to disturb the verdict, so that because an error has been committed it is not to be redressed. The jury divides the responsibility with the judge, and had it rested upon him alone, error would have been avoided. Then there is the expense, which in the case of special juries is reckoned at somewhere about thirty pounds, but the expense in money is the least part of the loss both to the parties and the public. The proceedings are far more tedious with a jury than they would be with a judge sitting alone. A great portion, both of the evidence and of the addresses of the advocates, would be spared were the jury out of the case. Witnesses are called, and those called are examined and cross-examined, with the hope of affecting the jury; speeches are made with the same view, and the party pays as well as the public for the time thus consumed.

It is said that the judge, having to make the jury understand the case, and apply the evidence, is obliged to give a more watchful attention both to the addresses of the counsel and the testimony adduced. But nothing can be more inaccurate than this view of the subject. The judge would be more under the necessity of closely attending to every part of the case if he had the sole responsibility of the decision, always supposing him honestly to discharge his duty. When he can throw it upon the jury he has a temptation, which is too often found irresistible, to be satisfied with explaining the matter in general terms to them, and laying the evidence before them, without so vigorously applying his mind to the question as to form an opinion respecting its real merits.

A difficulty is supposed to arise from the judge not fully stating his views, so as to let parties except. But this assumes him not to perform the duty of his office. So even where there is no question of excepting, no matter of law, but only a question of fact, he will be bound to comment upon the evidence, and to give his opinion upon the

balance where there is a conflict. His reasons in giving judgment need not be and never will be by any means given at such length as is necessary where he has to lay the evidence with his comments before the jury. But he will distinctly state the grounds of his judgment, and he will thus enable the parties to perceive on what it turns, which is frequently impossible with a verdict, and he will also afford the proof that he has fully examined and well considered the whole case.

The reasons given against the proposed alteration in the judicial practice are rather of a declamatory nature than founded upon practical views. It is said that the habit of attending courts as jurors gives the people an interest in the administration of justice, and teaches them useful lessons on the law. We somewhat marvel that any persons who have seen the common juries, especially in the country, should take this romantic view. There is no question of dispensing with juries altogether. They will still be called in to aid in the administration of both civil and criminal justice. The only question is whether they must always be summoned, when in nine cases out of every ten, at the very least, their attendance is a mere form, and the judge really disposes of the case, though with no little diminution of his responsibility. Their education may well be conducted by attending as witnesses, as spectators, as jurors in all criminal trials, and also as jurors in every case in which either of the parties desire the trial to be by jury; but it certainly does seem to be a monstrous proposition, that suitors should be compelled against their will to submit their differences to a tribunal which in many cases they regard as unsatisfactory and capricious, in order that a jury may be taught law at their expense.

Recent American Decisions.

Supreme Judicial Court of Massachusetts, Suffolk, ss., March Term, 1851.

EBENEZER SMITH *v.* THE CITY OF BOSTON.

Discontinuance of Street — Damages.

The discontinuance of part of a street in a city, by order of the Mayor and Aldermen, whereby the value of lands abutting on other parts of the street, and on neighboring streets, is lessened, is not a ground of action against the city by the owner of such lands, if they are still accessible by other public streets.

The facts in the case sufficiently appear in the opinion of the court, which was delivered by

Shaw, C. J. — This was a petition for the assessment of damages alleged to have been done to the plaintiff in his property, by the discontinuance of a portion of Market Street, in the city of Boston, by order of the Mayor and Aldermen. It appears by the order of discontinuance and by a plan which was made part of the case, that this discontinuance was of that part of Market Street which would be crossed by the tracks of the Boston and Maine Extension Railroad Co., which, by their charter, have been permitted to extend their road through part of the city. The petitioner owned several lots near that street, and offered to prove at the trial in the Court of Common Pleas, that the value of each had been lessened, and the rent of one or more of them diminished; but it appeared that no one of the parcels bounded on that part of the street which had been discontinued, and that all were accessible by other public streets. The presiding judge ruled, that no damage was recoverable; to which the petitioner excepted.

Upon this state of facts, the court are of opinion that the direction given by the judge at the time was correct, and that the inconvenience sustained by the petitioner, if any, was not such an injury done him in his property, as to entitle him to damage within the true intent of the law. There is obviously a difficulty in laying down a general rule applicable to all cases; one limit however must be observed, which is, that the damage for which a recompense is sought, must be the direct and immediate consequence of the act complained of, and that remote and contingent damages are not recoverable. The inconvenience of the petitioner is experienced by him in common with all the rest of the members of the community. He may feel it more in consequence of the proximity of his lots and buildings; still it is a damage of like kind, and not in its nature peculiar or specific. The creation of a public nuisance by placing an obstruction in a highway, can only be punished and suppressed by a public prosecution; and though a man who lives near it and has occasion to pass it daily, suffers a damage altogether greater than one who lives at a distance, he can have no private action, because in its nature it is common and public. But if he suffers a peculiar and special damage not common to the public; as if by driving on to such an obstruction in the night and

injuring his horse, he may have his private action against the party who placed it there. The damage complained of in this case, though it may be greater in degree, in consequence of the proximity of the petitioner's estates, does not differ in kind from that of any other members of the community who have occasion more or less frequently to pass over the discontinued highway. The petitioner has free access to all his lots, by public streets. The burden of his complaint therefore is, that in going to some of his houses, in some directions, he may be obliged to go somewhat further than he otherwise would. So must the inhabitant of the south end of the city, or the citizens of other towns, with their teams or carriages, who would have had a right to use the discontinued way. Of the question of public convenience, it is the province of the Mayor and Aldermen, upon a balance of all considerations bearing upon it, to decide. It is not to be presumed that they will discontinue a highway once laid out, unless the considerations in favor of the discontinuance decidedly preponderate.

In this case, the rule adopted by the judge seems to have been well adapted to the circumstances of the case, and well guarded; it was limited to damage done to some estate bounding on the highway discontinued. It has been held that in assessing damage for land taken for a railroad, it is not competent to give in evidence, by way of set-off, the benefit done to other lands of the claimant, not connected with the land taken, by the establishment of the railroad. *Meacham* v. *Fitchburg Railroad Co.* (4 Cush. 292.) It seems to us that this case falls under the same principle. For if the petitioner could give in evidence loss to estates not bounding on the street discontinued, it would be competent for the respondents to show, that the street was discontinued in consequence of the railroad, and the better to secure the safety and convenience of the travel incident to it, and then show, by way of set-off, any benefit done to any of the complainant's real estate situated any where near the railroad. This would be inadmissible, upon the rule stated, which is founded on the consideration, that the general benefit, which a town or a village derives from a railroad, is common and general to all, which one, a portion of whose land is taken for it, is no more bound to pay for, than any other person deriving a benefit in common, from public improvements. *Palmer Co.* v. *Ferrill*, (17 Pick. 58.)

We do not mean to be understood as laying down a universal rule, that in no case can a man have damages for the discontinuance of a highway, unless his land bounds upon it, although as applicable to city streets, intersecting each other at short distances, it is an equitable rule. A man may have a farm, store, mill, or wharf, not bounding on a street, but communicating with it by a private way, so situated that he has no access to his property but by the public way. If this is discontinued he must lose the benefit of his estate, or open a way at his own expense, which might be a direct and tangible damage, consequent upon the discontinuance of the public way, and we are not prepared to say that he would not have a claim for damages under the statute.

Exceptions overruled.

B. R. Curtis, for the petitioner. *P. W. Chandler*, for the respondent.

FREDERICK W. ROBINSON *v.* AZEL HOWARD AND TRUSTEE.

Trustee Process — Officer — Receipt.

An officer is not liable, under the trustee process, to a creditor of a person arrested by him on a criminal warrant, for money or other property, taken by the officer, under color of his official duty, from the person of his prisoner.

The giving of a receipt to the prisoner by the officer for the articles so taken, creates no such liability on the part of the officers.

THIS was an appeal from the judgment of the Court of Common Pleas, discharging the trustee, James W. Pierce, upon his answers, which were substantially as follows: — Prior to the service of the writ, the plaintiff complained against the defendant in the Police Court of the city of Boston, for larceny, by stealing a note of hand, alleged to have been delivered to him for the purpose of getting it discounted. Upon this complaint a warrant was obtained, and placed in the hands of Pierce as an officer and constable, for service; and he, accompanied by the plaintiff, proceeded to Greenfield, in the County of Franklin, and there arrested Howard. Soon after the arrest, Pierce stated to Howard, that it was his duty as an officer to take from him every thing of value which might enable him to effect an escape between Greenfield and Boston. Howard protested against the proceeding, and alleged that the note, with the stealing of which he was charged, was payable to his own order. Pierce took from him $175 in money,

and sundry small articles, worth not more than $10. In the course of the return to Boston, Pierce learned such facts from Robinson as satisfied him that no larceny had been committed, and on the morning after his arrival in Boston went to the jail to return the property to Howard. When upon the platform of the jail, the present trustee process was served upon him. Within a few hours after this, Howard's case was examined in the Police Court, and he was discharged.

In this court, the alleged trustee being further interrogated, disclosed, that when he took the articles from Howard, as before stated, he gave him a paper acknowledging that he had taken such articles, &c. from him, and he thought he added the words, "When arrested on a charge of larceny;" that he did this to avoid future controversy about what he had taken, and that there might be something to show how he came possessed of the property, in case any accident should happen to him with it in his possession.

A. H. Fiske, for the plaintiff, cited Cush. Tr. Pro. 16–19; *Swett* v. *Brown*, (5 Pick. 178); *Allen* v. *Hall*, (5 Met. 263.)

J. C. Park, for the trustee.

The opinion of the Court was delivered by

Shaw, C. J. — The court are of opinion, that the judgment of the Court of Common Pleas ought to be affirmed, and the trustee discharged. The trustee was an officer charged with the service of criminal process, issued on the complaint of this plaintiff. He acted by color of his office, and, as incidental to the service of the process, took from the trustee the money and property in question, declaring it to be in the performance of his official duty, which was to carry the defendant before the examining magistrate. The prisoner could make no resistance, and in no other way express his objection and dissent, than by protesting, which he did. We think that both the officer, and the plaintiff who claims through him, are estopped to deny, that in this respect he acted officially. He is therefore within the spirit if not within the letter of the Rev. Stat. chap. 109, § 30, clauses 2 and 3. The property was taken by him as a public officer, performing an official duty. We should fear, that any other construction would lead to a gross abuse of criminal process. Such process might be used to search the person, or otherwise, under color of lawful authority, to get possession of the property of a

debtor, in order to place it in the hands of the officer, and thus make it attachable by trustee process.

The receipt, disclosed in the last examination, given by the officer to the person arrested after the arrest, appears to us to make no difference. It was a mere certificate of the fact that he had taken the property to give the defendant the benefit of it as proof, and also exempt himself from the charge of any unlawful intent in taking it.

Trustee discharged.

Hampshire, 1851.

SAMUEL A. BOTTOM ET AL. *v.* AUGUSTUS CLARKE AND TRUSTEE.

Trustee Process — What is not Attachable.

Where a small trunk, locked, the contents of which were not known, was deposited in the vault of a bank, with the consent of the officers of the bank, for safe-keeping merely, and the officers had no authority to open the same, for the purpose of ascertaining its contents; it was *held*, that neither the officers nor the bank were chargeable as the trustees of the owner, either for the contents of the trunk, or for the trunk itself.

IN this case, the supposed trustees summoned were the President, Directors and Company of the Holyoke Bank, and Ira Clarke, their President, whose answers, upon which the case was submitted, it was agreed, should be received also as the answers of the bank.

The interrogatories and answers were as follows.

1. At the time of the service of the writ, had you or the bank any goods, effects or credits of the defendant, in your or their hands or possession? Had he deposited any personal property with either? If any, please state what, and on what terms.

Answer. — At the time of the service of the writ there was in the vault of the Holyoke Bank a small trunk, which had been left in the vault by Augustus Clarke; neither the president nor any other officer of the bank has known its contents, or had access to said contents. He merely requested the privilege of leaving it in the vault, whenever he brought it there; and this privilege I have sometimes given, when I was present at the time; or, if I was not there, Mr. Green, the cashier, or the young man who is clerk, would give it. Neither the bank nor I personally took any responsibility of safely keeping said trunk; and the said Augustus Clarke usually himself put it in the vault and took it from thence.

2. Did you keep the trunk locked up with other property in the vault, and for how long had the practice you speak of continued? Please state also whether any person, or the cashier, had a right to enter your vault without permission of the officers of the bank, and whether said Clarke, when putting it into the vault or taking it therefrom, acted under that permission.

Answer. — The trunk was kept locked up with other property in the vault, whenever it was there at the usual time of locking the vault. I can't recollect how long he had been in the practice of leaving the trunk there; he had done so for some time prior to the service of the writ. No

person has access to the vault without permission of some one of the officers. And, as I have stated, Augustus Clarke acted, as I have no doubt, under a permission from myself or the cashier, or clerk in the bank, present at this particular time of leaving it. But I have no knowledge or recollection as to who was present or gave the permission at this particular time. I might have given it, Mr. Green might, or the clerk might; whenever such permission was given, it was not given by either of us so much as an officer of the bank having any authority in behalf of the bank to grant such permission, as a neighbor, and granting a neighborly favor.

3. Did this deposit differ from other deposits in the vault by other persons, of trunks or other valuables?

Answer. — It did not differ from many, perhaps most of the other deposits of trunks or valuables. We have often given a permission such as was given to Augustus Clarke.

4. Have you at any time known from said Clarke, or otherwise, any of the contents of said trunk, or of what the contents consisted?

Answer. — I have not.

The opinion of the court was delivered by

METCALF, J. — The Holyoke Bank and its president, John Clarke, are summoned as trustees of the principal defendant. By agreement of the parties, the answer of the president is taken, as well for the bank as for himself. On this answer, the question has been raised, whether the trunk, if intrusted or deposited in the hands or possession of any one, was so intrusted or deposited in the hands or possession of the bank or of the president. But we need not decide this question; because we are of opinion that, though it should be decided in the affirmative, yet that both the bank and the president must be discharged, upon another ground. Nor need we decide the question, whether the mere possession of property, by a party having no claim to hold it against the owner, renders such party liable therefor as trustee, and thereby to be subjected to trouble and expense in answering to a claim in which he has no interest. See *Staniels* v. *Raymond*, (4 Cush. 314, 316.)

The trunk, in this case, was put into the vault of the bank, as a place of safe keeping merely. Its contents were unknown, and are still unknown, to the officers of the bank; and they had no right to open it, either before or after service of the trustee process, for the purpose of ascertaining its contents. Such an act would have been a breach of trust, which would have subjected them to an action by the depositor. *Foster* v. *Essex Bank*, (17 Mass. 504, 506.) Now as the answer of the bank and its president furnishes no evidence of the contents of the trunk, we are not authorized to presume that it contained goods, effects or credits, which could be attached and held

to satisfy a judgment against the owner. Judging from our extra-judicial knowledge concerning such deposits in banks, we should rather presume that the trunk contained notes and securities, or other valuable private papers, that are not within the reach of the trustee process. But we make no presumption whatever. The parties summoned as trustees, in this case, must be charged or discharged, on the answer which has been filed, and on that alone. That answer does not show that the trunk contained any attachable goods, effects or credits of the principal defendant.

It was suggested, in behalf of the plaintiffs, that the bank, or its president, must be charged as trustee, at least for the trunk, if not for its contents, and is bound, by the Rev. Stats. c. 109, § 22, to deliver it to the officer, who may hold an execution against the owner, to be sold as if taken on execution in the common form. But, by that section, it is only when the party, who is summoned as trustee, is "chargeable" as such, by reasons of "goods or chattels, other than money," held by him, that he is required to deliver the same to such officer. And we have already seen that the parties summoned as trustees, in this case, are not chargeable for the unknown contents of the trunk, and cannot lawfully open it and take its contents from it. If, therefore, they were to be charged, by reason of the trunk, and were bound to deliver it to an officer, to be sold on execution, they must also deliver to him the contents, for which they are not chargeable, including even money, (if it contains money,) which they are not by law bound so to deliver. As the trunk and its contents cannot lawfully be separated by the officers of the bank, and as they are not chargeable by reason of the contents, and cannot lawfully deliver the one, without delivering the other, they are not chargeable by reason of either.

By the custom of London, locked trunks and boxes are subject to foreign attachment, and the court, after four several defaults of the owner, gives judgment that they be opened. Priv. Lond. (3d ed.) 266; Com. Dig. Attachment, C. We have no such law or custom. It may be, however, that an officer, in the service of an execution, is authorized to break open the judgment debtor's private trunk (2 Show. 87,) for the purpose of selling the contents, if they are liable to execution. But he must first obtain lawful possession of the trunk. And we cannot help him to such possession, in the present case.

Trustees discharged.

Superior Court of the City of New York, December General Term, 1852.

Before Justices Duer, Bosworth, and Emmett.

Horton H. Burlock, Administrator, &c. of Eliza A. F. Burlock, deceased, Appellant,

vs.

John Peck and George Gordon, Jr., Executors, &c. of Elisha Peck, deceased, Respondents.

Party Wall — Grantee of Builder entitled to pay therefor when Party Wall used after Builder has conveyed his Lot — Covenantor liable on his Covenant to pay for when used, if Party Wall be used by his Grantee after Conveyance of Covenantor's Lot.

E. P. in his lifetime being the owner of lots 65, 67, 69, 71, 73 and 75, Third Street, in the city of New York, by warrantee deed, duly recorded, conveyed the three first-mentioned lots to J. H., and in the deed of conveyance gave to the party of the second part the privilege to build a party wall twelve inches thick, extending six inches on each side of the easterly line forty-two feet deep, which wall the party of the first part agreed to pay for when used, and each party had the privilege of extending said party wall ten feet further on the same conditions. In pursuance of this license, J. H. erected a dwelling-house on lot 69, the easterly wall of which was twelve inches thick and forty-two feet deep, and extending six inches on each side of the premises conveyed, that is to say, six inches thereof on lot 69 and six inches thereof on lot 71, said wall being of the value of four hundred dollars. After the building of the said dwelling-house and party wall, the said J. H. by warrantee deed with full covenants, and which was also duly recorded, conveyed to E. A. F. B., wife of H. H. B., by and with his consent, lot 69, Third Street, describing the same by the street number and by metes and bounds, no reference being made therein to a dwelling-house or party wall. Afterwards E. P. conveyed to the said J. H. the three last-mentioned lots, and in building on said lots last-mentioned in the lifetime of E. A. F. B. and E. P., used the said party wall. *Held*, in an action brought by the administrator of E. A. F. B. against the executors E. P., that the plaintiff was entitled to recover against the defendants the value of one half of the party wall so used by J. H., with interest from the time of such use; that the conveyance by J. H. to E. A. F. B. transferred to her the whole party wall; that until E. P. or his grantee used the party wall, it was the sole property of E. A. F. B. from the time of the conveyance to her; that when J. H. built on lot 71 and used the party wall, he appropriated to his own use her property; that it was lawful for him so to appropriate it, but when it was so used *she* had a right to be paid one half of its value, for the reason that it was her property which had been taken and used; and that when J. H. used the same, E. P. then became liable to her on the covenant in his deed to J. H.; that a sale and conveyance of property subject to a certain use on payment of a stipulated consideration, carries with it the right to receive such consideration when the stipulated use shall be made of the property; that when the party wall was used the intestate's right of action to recover half its value became perfect and absolute; that the title to the half of the wall standing on lot 71 from and after the time it was used by the owners of lot 71, was vested absolutely in him, and the owner of such lot has and from that time had an easement in the other part for the support of his own house; and that as the party wall was used in the lifetime of E. A. F. B. nothing passed to her heir, and consequently the action was properly brought in the name of her administrator.

This was an action brought to recover the value of one half of a party wall, with interest from the time of use. The complaint set forth, that Elisha Peck in his lifetime was seized and possessed in fee simple of lots 65, 67, 69, 71, 73 and 75, Third street, in the city of New York, and being so possessed thereof on the 8th of April, 1839, by warrantee deed which was duly recorded, conveyed to one John Hanrahan lots 65, 67 and 69 Third street, and made the following provision in the deed: — "And the said party of the second part has the privilege of building a party wall twelve (12) inches thick, extending six inches on each side of the easterly line, forty-two feet deep, which wall the said party of the first part agrees to pay for when used, and that each party has the privilege of extending said party wall ten feet further on the same conditions." That on or about the 15th of August, 1839, the said John Hanrahan built a party wall extending six inches on each side of the easterly line of said premises, that is to say six inches thereof on lot 71 Third street and six inches thereof on lot 69 Third street; that the said party wall was of the depth of forty-two feet, and twelve inches thick, and of the value of four hundred dollars, and formed the easterly wall of a dwelling-house also erected by said John Hanrahan on lot 69 Third street; that after the building of the said dwelling-house and party wall, the said John Hanrahan by warrantee deed, dated March 20th, 1840, and which was duly recorded, conveyed to Eliza A. F. Burlock, wife of Horton H. Burlock, lot 69 Third street, describing the same by the street number and by metes and bounds, together with all and singular the tenaments, hereditaments and appurtenances thereunto belonging or in any wise appertaining; and also, all the estate, right, title, interest, dower and right of dower, property, possession, claim and demand whatsoever of the said party of the first part, of, in and to the same and every part and parcel thereof with the appurtenances; that on the 1st day of April, 1846, the said Elisha Peck conveyed to the said John Hanrahan by warrantee deed lots 71, 73 and 75 Third street, and that after the purchase thereof the said John Hanrahan erected thereon certain dwelling-houses, and in the course of the erection of one of said houses, on lot 71 Third street, that is to say, on or about the 21st day of April, 1846, used the said party wall, whereby the said Elisha Peck became liable to pay to the

said Eliza A. F. Burlock the value of one half of the said party wall so built by him the said John Hanrahan on the said lots 69 and 71 Third street as aforesaid; that the said Eliza A. F. Burlock died intestate in the city of New York on the 30th of October, 1847, leaving an only heir at law, the issue of her marriage with the plaintiff; that letters of administration were on the 31st of May, 1852, granted to the plaintiff by the surrogate of the city and county of New York; that the said Elisha Peck died in the said city on or about the 24th day of November, 1851, having a last will and testament in which he appointed the defendants executors; that said will had been duly proved before said surrogate and letters testamentary granted to the said defendants by the said surrogate; that the said Elisha Peck in his lifetime had not paid the said sum of two hundred dollars, the value of one half of the said party wall either to the said Eliza A. F. Burlock in her lifetime, or to the plaintiff before or since her death, nor had the executors paid the same, &c. Wherefore the said plaintiff claimed judgment against the defendants for the sum of two hundred dollars, with interest from the 21st of April, 1846, besides costs.

The defendants demurred to the complaint, and set forth in their demurrer the following causes: —

1st. That the complaint does not state facts sufficient to constitute a cause of action against the defendants.

2d. That the same does not state and set forth any sufficient covenant or agreement on the part of the defendants' testator, running with the land conveyed by him to John Hanrahan by the deed dated April 8th, 1839, and mentioned in the complaint in this action or otherwise, whereby the plaintiff's intestate as grantee of the said John Hanrahan did or could acquire any right to demand and receive of the defendants' testator the value of one half the party wall mentioned in the complaint when used, forasmuch as the clause concerning said party wall contained in the deed above-mentioned and recited in said complaint, relates to things to be done and performed by the respective parties thereto, after the date of said deed, and the assigns of said John Hanrahan are not named therein.

3d. That the same does not state and set forth any covenant or other agreement on the part of the defendants' testator to pay for said party wall, or the value of one half thereof when used, sufficient in law to charge the defend-

ants' testator personally with such payment after the grant and conveyance mentioned in the complaint by him to John Hanrahan, by deed bearing date the first day of April, 1846, of the land therein described, adjoining the land of the plaintiff's intestate, on the easterly side thereof; and that it appears on the face of the said complaint that the last-mentioned land was before the use of the said party wall, granted and conveyed as above-mentioned by the defendant's testator to the said John Hanrahan.

The demurrer was argued at the October, 1852, special term, before Judge CAMPBELL, who rendered the following decision:

"I think this agreement by the grantor to pay for the party wall thereafter to be erected by the grantee, without mentioning his assigns, was a personal covenant only, and does not run with the land, and did not therefore pass with the deed to Mrs. Burlock. The demurrer is well taken, and there must be judgment for the defendants."

On this decision judgment was perfected against the plaintiff, and he appealed therefrom to the general term.

The case was very fully argued before the court in banc, by *H. H. Burlock, Esq.*, for the appellant; and by *Horace Holden, Esq.*, for the respondent.

The opinion of the Court was delivered by

BOSWORTH, J. — The conveyance by Hanrahan to Mrs. Burlock of lot 69, in March, 1840, transferred to her the title to the whole of the party wall standing on the easterly line of the lot: six inches of it had been lawfully erected on lot 71. The right and privilege to so erect it, were given by the deed of 1839 from Peck to Hanrahan. Until Peck or his grantee of lot 71, built on the latter lot, and used the party wall, the wall was the sole property of Mrs. Burlock from the time lot 69 was conveyed to her. Nothing had been paid for the party wall up to the time she became the owner of lot 69. The party wall was not used by any owner of lot 71 until over seven years after she became the absolute and exclusive owner of lot 69, of the building thereon with its appurtenances, and of every claim and demand of her grantors of, in, and to the same.

When Hanrahan built on lot 71, and used the party wall of the building belonging to plaintiff's intestate, he appropriated to his own use her property. It was lawful for him to so appropriate it, but when it was so used, she had a right to be paid one half of its value. If Peck was liable under

his covenant, to pay half of its value, she was entitled to the payment, for the reason that the property which had been taken and used was hers. *Brown* v. *Pentz*, (N. Y. Legal Observer, Vol. 11, p. 24, decided by the Court of Appeals); *United States* v. *Appleton*, (1 Sum. R. 492.)

Mrs. Burlock bought and paid for a lot with a dwelling-house on it, having half of one of its walls rightfully on, and adjoining, lot belonging to Peck, which party wall he or his grantees had a right to use, but with respect to which he covenanted to pay half of its value when used. When it was used Mrs. Burlock owned it, and she was equitably entitled to the money. The sale and conveyance of property, subject to a certain use on payment of a stipulated consideration, carries with it the right to receive such consideration when the stipulated use shall be made of the property.

We have not overlooked the numerous decisions of the Supreme Court of Pennsylvania, which hold that the claim to compensation for the use of a party wall is personal to the first builder, is a mere *chose* in action, is not a lien on the land, will not pass to a grantee of the building of which it is a part by a conveyance of the lot and building with its appurtenances, and is only a personal charge against the builder of the second house. *White* v. *Smyder*, (2 Miles, 395); *Oat* v. *Middleton*, (Ib. 248); *Hart* v. *Kucher*, (5 S. & R. 1); *Inglis* v. *Bringhurst*, (Dallas, 341); *Gilbert* v. *Drew*, (10 Barr. 219); *Todd* v. *Stokes*, (10 Ib. 155).

These cases either arose under the statute of that State, of the 24th of February, 1721, or were decided on the authority of cases thus arising. That statute provides, that "The first builder shall be reimbursed for one moiety of the charge of the party wall, or for so much as the next builder shall use, before he breaks into the wall." *Davids* v. *Harris*, (9 Barr. 503). We are unable to perceive any substantial difference between this case and *Brown* v. *Pentz*, and on the authority of the latter the plaintiff is entitled to recover, unless the objection is well taken that the action should have been brought by the heirs, instead of the administrator of Mrs. Burlock.

When this party wall was used, her right of action to recover half of its value became perfect and absolute. This was in her lifetime: the title to the half of the wall standing on 71, from and after the time it was used by the owner of lot 71, was vested absolutely in him; and the owner of

such lot, besides owning in fee the part standing on his lot, has, and from that time had, an easement in the other part for the support of his own house. The title to nothing for which Peck was to pay descended to the heirs of Mrs. Burlock. It would seem to be as clear that the administrator should recover for the half of the wall, as for the unpaid consideration money of land sold and conveyed by an intestate in his lifetime. *Hamilton* v. *Wilson*, (4 Johns. R. 72.)

We think the judgment appealed from should be reversed, and judgment entered for the plaintiff, but with liberty to the defendants to withdraw the demurrer and answer in twenty days on payment of the plaintiff's costs upon the demurrer and of this appeal.

Recent English Decisions.

[From XVII. Jurist.]

Court of Exchequer, February 12, 1853.

CLAY *v.* CROWE, p. 262.

Law Merchant — Lost Bill of Exchange — Pleading.

Where a negotiable bill of exchange is lost, at the time a party is called on to pay it, the loss constitutes a defence: *aliter*, if it is not a negotiable bill.

In an action for goods bargained and sold, the defendant pleaded that after the debt became due he accepted for the amount a bill of exchange payable to the plaintiff or order; that the plaintiff lost the bill and ceased to have any power or control over it; — *Held* bad on general demurrer, for not showing that the bill was not running at the time when it was lost.

THIS was an action for goods bargained and sold. Plea: that after the debt became due, the defendant accepted for the amount a bill of exchange, payable to the plaintiff or order; that the plaintiff afterwards lost the bill, and ceased to have any power or control over it. To this plea the plaintiff demurred generally.

Atherton, in support of the demurrer. — The plea is bad on two grounds. First, it ought to have shown that the bill of exchange set up as the defence to the action, was not overdue at the time when it was lost. No action can be maintained on a negotiable bill unless the plaintiff is ready to deliver it up on payment; were this not so, the

defendant might be sued afresh by any stranger into whose hands the bill found its way, and thus be compelled to pay twice over. *Hansard* v. *Robinson* (7 B. & Cr. 90); *Ramuz* v. *Crowe*, (1 Exch. 167; 11 Jur. 715.) If, however, the bill were overdue, no stranger could have a better title than the plaintiff to sue on it. Secondly, the plea ought to have negatived the fact of the bill having been indorsed over at the time of the loss; in which case also the plaintiff only could sue on it.

Macnamara, contra. — The plea is good. *Ramuz* v. *Crowe* is an authority against the plaintiff on the second point. As to the first, there can be no doubt a party is not bound to pay a negotiable bill of exchange unless the plaintiff has it in his possession. The loss of a bill implies negligence in the loser, who ought to bear that loss, especially as he has a remedy by applying to a court of equity, which would compel payment of the bill on giving an indemnity; and also under the 9 & 10 Will. 3, c. 17, s. 3. He has therefore no right to cast on an innocent party the inconvenience and risk of an action at the suit of the finder: and the bill being overdue can make no difference in this respect. The reasoning in *Hansard* v. *Robinson* applies equally to both cases, and indeed, the loss of the bill there was after it became due. [He cited also Bayl. Bills, 140, 6th ed., and *Woodford* v. *Whiteley*, (1 Moo. & M. 517).] [Parke, B. — In *Price* v. *Price* (16 M. & W. 232), a plea of this kind was held bad for not alleging that a promissory note was still running.] That case proceeded on the assumption that the note was still in the hands of the plaintiff. Besides, the present plea would have been good if it had only said that the plaintiff had taken the bill of exchange. The receiving a bill of exchange for a debt is *primâ facie* an answer to an action for that debt: and whether the bill was overdue, or had been indorsed over, are facts lying within the peculiar knowledge of the plaintiff, and consequently ought to come from him.

Atherton, in reply.—There is a difference between pleading and evidence. It may be that, as matter of evidence, the circumstances here suggested as being within the knowledge of the plaintiff, ought to be proved by him. But the question on the pleadings is, whether, taking every fact stated in this plea to be true, the plaintiff is barred of his action. *Cur. adv. vult.*

The judgment of the court, consisting of Pollock, C. B., Parke and Alderson, BB., was now delivered by

Parke, B. — We are of opinion that the plea in this case is bad in substance.

The law upon the subject of lost bills may be considered to be settled by the cases to be this: — If a negotiable bill or note, that is, a bill payable in its original state to bearer or order, be lost at the time a party to it is called on to pay, the loss constitutes a good defence: otherwise, if it be not in its original state a negotiable bill or note, as where it is payable to the payee only. The former of these propositions is supported by the well-considered judgment of the Court of King's Bench in the case of *Hansard* v. *Robinson*, (7 B. & Cr. 90), which does not confine the necessity for the production of the bill or note by the plaintiff to the cases where it was payable to bearer originally, or became so by indorsement in blank, (as indeed the bill in that case did); but Lord Tenterden, in giving the judgment of the court, lays down the position generally, that the law merchant requires the production of the instrument before a party to it can be called on to pay. And this case was followed in *Ramuz* v. *Crowe*, (1 Exch. 167; 11 Jur. 715.) The case of *Wain* v. *Bailey*, (10 Ad. & El. 616), however, decides that this doctrine applies only to negotiable bills. The loss of a note or bill payable to the payee only, is no answer to an action by him.

The bill given in the present case was a negotiable bill, and therefore its loss at maturity or afterwards, when the plaintiff should sue on it, would have been an answer to an action at his suit on the bill, and probably to this action on the consideration for which the bill was given. But the loss of a bill not yet arrived at maturity is immaterial. The bill may be found before it is due, and then the previous loss is not of the least consequence. The plea must be taken most strongly against the defendant, and if we assume the bill to be still running, which we ought to do, the loss of it in no way affects the plaintiff's case.

For this reason we are of opinion that our judgment should be for the plaintiff. — *Judgment for the plaintiff.*

Vice-Chancellor Wood's Court, March 11th.

HAVENS v. MIDDLETON, p. 271.

Lessor and Lessee — Covenant to insure.

Lessee covenanted to insure the demised premises in the joint names of the lessor and lessee. The premises afterwards became vested in an under-lessee, who insured in the name of the original lessor alone, or of his representatives. It was not known whether the original lessee was alive or dead, or who was his representative: — *Held*, that this was a sufficient compliance with the covenant, so as to prevent the lessor from taking advantage of a proviso in the lease for re-entry on non-performance of the covenants.

THE question in this case was, whether or not there had been a breach of a covenant to insure, in a lease. The covenant was by the lessee, for himself, his heirs, &c., to insure the premises in the joint names of the lessee and lessor. The insurance was in the name of the lessor alone. The premises were originally demised by a person named Child to a person named Plaskett, for a term of eighty years, with a proviso for re-entry on non-performance of the covenants, &c.; and were now vested in the plaintiffs, as trustees for sale, for the original term of eighty years, minus one day. The plaintiffs had accordingly contracted to sell to the defendant, who had paid his deposit. The defendant took the objection that the covenant to insure had not been properly observed, and that a good title could not be made, and brought an action to recover his deposit money. The plaintiffs now moved to restrain that action, their bill being filed also for a specific performance of the contract. The other facts and the arguments sufficiently appear in the judgment.

Sir W. P. WOOD, V. C. — The premises being vested in Plaskett for eighty years, he demised, by way of underlease, to the parties represented by the plaintiffs, reserving the reversion of one day. The parties who have taken the underlease have insured in the name of the original lessor. So far as that insurance goes, it is not a strict compliance with the covenant. A party covenanting to insure in one name is not to insure in another name, or to put his covenantee in a worse position than has been stipulated for. In consequence of the correspondence, the present vendor procured from the lessor a receipt in this form, viz. for a quarter's ground-rent, "the policies of insurance having been this day produced to me, and approved of." I apprehend, therefore, that the lessor having

at the time of giving the receipt approved of the insurance, he could not even at law bring ejectment in respect of what had occurred up to that time, although this receipt was not under seal. In *Doe* v. *Gladwin*, (6 Q. B. 953,) the lessor of the plaintiff, who was the assignee of the original lessor, recovered the premises in consequence of the subsequent breach; it was not denied that the original lessor had by his conduct waived past breaches. I think, therefore, that in this case the original lessor would not be entitled to recover in ejectment. But then it was said that this difficulty has arisen in consequence of there not having been a literal performance of the covenant: that Plaskett, who has the reversion of one day, is not to be found, and that there may be some remedy on the part of Plaskett in respect of any future breach: that the name of Plaskett cannot be used to effect this insurance, and literally to comply with the covenant: and that he might recover in an action against his sublessees, the plaintiffs, or parties claiming under them, in case of non-performance. As to Plaskett himself, he has made a security; and there is in the sub-demise by Plaskett no covenant on his part to perform the covenants in the original lease. He could not enter, neither could he bring an action of covenant. As to the original lessor, the case is somewhat different, for he could bring an action. I have not been able to find any case in which, the party covenanting that he would insure in the joint names of the lessor and lessee, it has been held that the lessor can complain because the insurance is effected in his own name only. The two cases referred to, *Doe* v. *Gladwin*, (6 Q. B. 953,) and *Penniall* v. *Harborne*, (11 Q. B. 368,) do not bear out any such proposition. The first case I have already noticed. *Penniall* v. *Harborne* was exactly the reverse of the present case. There the lessee had covenanted to insure in the name of the lessor only, and he insured in the joint names of the lessor and himself, the lessee. That was held not to be a performance of the covenant. It was not so beneficial to the lessor as the arrangement for which he had stipulated; it did not give him the sole power over the moneys to be recovered; and if the lessee survived, it prevented the lessor from having any power over those moneys. In this case the insurance was to be in the joint names of the lessor and lessee. The introduction of the names of each was for his own benefit merely. No action

can be brought, because the lessee has done something more simply beneficial to the lessor than he had stipulated for. If A. covenanted with B. to pay moneys into their joint names in a bank, and he pays the same into the sole name of B., can B. complain? This is the same case. In the other cases which were quoted,[1] there was an inconvenience occasioned by the names of the lessor and lessee being joined. This being the only objection taken, the defendant has very fairly waived all further resistance to the specific performance. But as he is a purchaser who has taken an objection which he has failed to maintain, he must pay the costs.

Court of Queen's Bench — June 3, 1852.

THOMAS TIMMINS and MARY his Wife *v.* GIBBINS, one of the Public Officers of the Birmingham Banking Company, p. 378.

Money lent — Money had and received — Deposit with Banker — Bank Notes — Failure of Consideration.

On the 26th June, M. W. deposited with bankers, in the country notes of a country bank, payable in London, and received the following memorandum: — "Received of M. W. 80*l.* for which we are accountable.— 80*l.*, at 3*l.* per cent. interest, with fourteen days' notice." The notes were sent on the evening of the 26th, by post, to London, and on the 27th they were presented for payment, and refused. By that night's post they were returned to the bankers in the country, who, on the 28th, gave notice of dishonor to M. W. The bank which had issued the notes did not open after the day on which the notes were deposited, and had since become bankrupts, but neither party at the time of the deposit was aware of the bank being about to stop; — *Held*, that M. W. could not maintain an action for money lent, or money had and received, as there was no laches in the bankers, and the consideration for their promise had wholly failed.

DEBT for money lent to the Birmingham Banking Co. by the plaintiff Mary, whilst she was *sole* and unmarried, and for money had and received by the Birmingham, Banking Company to the use of the plaintiff Mary, whilst she was *sole* and unmarried, with a count for interest, and upon an account stated. First plea, except as to 15*l.*, which was paid into court, never indebted. On the trial, before Wightman, J., at the Staffordshire Spring Assizes in 1852, it appeared that the action was brought against the defendant, who was one of the public officers of the Birmingham Banking Company, to

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[1] See them quoted and commented upon in *Doe* v. *Gladwin* and *Penniall* v. *Harborne*.

recover the sum of 30*l.*, with interest, which the plaintiff Mary Weale, before her marriage, deposited with the branch bank of the said company at Dudley. The money was paid in on the forenoon of the 26th June, 1852, and the manager gave the plaintiff Mary an accountable receipt in a printed form, used by the bank, as follows:—"Received of Mary Weale 80*l.*, for which we are accountable. —For the directors and proprietors of the Birmingham Banking Company—R. H. Smith, Manager." At the foot was a memorandum, "80*l.*, at 3*l.* per cent. interest, with fourteen days' notice." 65*l.*, part of the said sum of 80*l.*, consisted of thirteen notes of a bank at Stourbridge, payable to the bearer on demand, either at Stourbridge, or at Messrs. Glyn, Hallifax, Mills & Co.'s, London, they being the London agents of the Stourbridge Bank. By the post of the evening of the 26th June, the manager of the branch bank at Dudley sent the thirteen notes to Messrs. Jones, Loyd & Co., London, for presentation, and on the next day they were presented for payment at Messrs. Glyn, Hallifax, Mills & Co.'s, and refused; and they were by that night's post returned by Messrs. Jones, Loyd & Co. to their correspondents at Dudley. On the 28th June, the manager of the Dudley Bank gave notice to Mary Weale that the notes of the Stourbridge Bank, which had suspended payment, had been presented at their bankers', and had been refused. The Stourbridge Bank carried on their business during the whole of the 26th June; they closed their bank at Stourbridge, which was five miles distant from Dudley, on the afternoon of that day at the usual hour, and did not open it again, and have since become bankrupts. Neither party at the time of the deposit was aware of the Southbridge Bank being about to stop payment. On the 13th January, 1852, the plaintiffs gave fourteen days' notice, and on the 29th made a formal demand of the money. The learned judge was of opinion, that as there had been no laches on the part of the banking company in endeavoring to obtain money for the notes by presenting them, and the notes were originally received on the belief that they would be paid, there was a failure of consideration for the promise of the banking company to pay within fourteen days after notice, and therefore the plaintiffs were not entitled to recover. A verdict was accordingly entered for the defendant, with leave to move to enter a verdict for the plaintiffs for 65*l.* In the following **Easter Term, (April 19),**

Keating moved for a rule *nisi* accordingly, on the ground that the transaction amounted to a sale of the notes, and therefore the bank, and not the depositor, was to be at the loss. [He cited *Camidge* v. *Allenby*, (6 B. & Cr. 373); *Miller* v. *Race*, (1 Burr. 452); and cases collected in Byles on Bills, 122, 6th ed.] — *Rule nisi.*

Alexander and *Chance* now showed cause. — The transaction was a bargain with the bank, the consideration for which failed, without any laches in the bank. Where a bank note is payable at two places, the holder has a right to present it at either. (Gibbs, C. J., in *Beeching* v. *Gower*, Holt, 313, 314.) In *Camidge* v. *Allenby*, (6 B. & Cr. 373,) there was laches in the vendor in retaining the notes: the dicta of the judges were not necessary for the decision of the case, and are not reconcilable with subsequent cases. (*Rogers* v. *Langford*, 1 Cr. & M. 637; *Turner* v. *Stones*, 1 Dowl. & L. 122, referring to *Henderson* v. *Appleton*, Chit. Bills, 658, 7th ed.) This was not a sale of the notes. The words, "for which we are accountable at fourteen days," mean that the deposit is made subject to its being ascertained that the notes are good security. Where there is a sale of goods, and bank notes are given, they are taken as cash, because no provision is made for their turning out bad, the parties being strangers to each other. In this case there is no exchange of money for notes, but a deposit of securities; the bank takes the notes, and does not pay any money until the party depositing them brings the receipt.

Keating and *Gray*, contra. — Where a bank note payable to the bearer is passed and received as cash, it is taken, if not indorsed, at the risk of the party receiving it. [Lord Campbell, C. J. — Suppose I put my name on a Bank of England note, could I be sued upon it if the Bank of England did not pay it? How would you frame the declaration? The indorsement is by the person exclusively entitled to receive the money. This instrument passes by delivery without indorsement.] Then the question is, whether on the passing of a bank note the party taking it takes it at his risk. The special terms upon which the bank received these notes shew that it received the notes as money, and took all risks. [Coleridge, J. — Suppose the Stourbridge bank had actually stopped payment a month before?] If the party took the notes as cash, the same principle would apply. In *Camidge* v. *Allenby*, (6 B. & Cr. 373,) the bank had stopped before the note was

delivered to the vendor in payment of the price of the goods. The same principle applies to the discount of notes. In B. N. P. 277, citing *The Bank of England* v. *Newman*, (1 Ld. Raym. 442,) it is said, "If the owner of a bill payable to the bearer deliver it for ready money paid down for the same, and not for money antecedently due, or for money lent on the same bill, this is selling of the bill, like selling of tallies, &c." WIGHTMAN, J. — The selling of the bill assumes that money was given for it: this is a case of deposit. Lord CAMPBELL, C. J. — If I get change for a bank note, does the party who pays me the change run the risk of the bank having stopped?] In that case there is a warranty that the note is worth what it purports to be worth. This was a ready-money transaction; the notes were not received in payment of an antecedent debt. The bank had the option to take or refuse the notes, and the plaintiff could not have demanded them back. In *Pott* v. *Clegg*, (16 M. & W. 321; 11 Jur. 289,) Pollock, C. B., expressed a doubt, not entertained by the rest of the court, whether there was not a special contract between the banker and his customer as to the money deposited, which distinguished it from the ordinary case of a loan for money, and said, (16 M. & W. 328,) "It seems to me that is a question for the jury, who ought to decide what is the liability of the banker, and whether the money deposited with him is money lent or not." There is a distinction between taking bank notes in payment for goods and in payment of a debt. Lord Holt, in *Ward* v. *Evans*, (2 Ld. Raym. 928, 930,) said, "Taking a note for goods sold is a payment, because it was part of the original contract; but paper is no payment where there is a precedent debt." [COLERIDGE, J. — Suppose I agree for the purchase of goods for £25, and pay for them by a bank note for £50 of a bank which has failed, for which I receive 25 sovereigns; that tries both principles.] Suppose I lend a person £50 in bank notes, to be paid at the end of a fortnight, and he keeps the notes in his pocket; at the end of a fortnight I can declare against him for money lent. [Lord CAMPBELL, C. J. — If he has been guilty of laches he has made the notes his own. WIGHTMAN, J. — Can a lender of worthless paper sue the party for money lent?] These notes may have been passing among many persons for twelve months. [Lord CAMPBELL, C. J. — That difficulty would occur in the case of payment

of an antecedent debt by notes. Can you distinguish this case from an ordinary deposit of money with the banker? He looks to his own advantage, though he receives the money indefinitely, as in this case.]

Lord CAMPBELL, C. J. — I am of opinion that this action cannot be maintained to recover the value of the Stourbridge Bank notes, either on the count for money had and received, or on the count for money lent. At the time of the deposit both parties believed that these notes were valuable securities, and that the bank who were the makers of them were solvent; but it turns out that they are valueless. No laches is attributable to the defendants, because the manager of their branch bank at Dudley sent them to London on the same day on which they were received, and gave due notice to the plaintiffs of their having been presented and refused. The transaction, therefore, is the same as if the Stourbridge Bank had been insolvent long before the deposit; and can it be said that a deposit of these securities, which turn out to be of no value, will support either a count for money lent, or a count for money had and received, there having been a total failure of consideration? When the transaction resolves itself, or can be resolved, into a sale of a negotiable instrument, the person who receives it must stand the risk; the maxim *caveat emptor* applies. But this transaction was merely a deposit with the bank, the money to be returned at the end of fourteen days after notice. Can it be said to be a general rule, that where bank notes are paid and received, they are always taken at the risk of the receiver, except in the case of payment for an antecedent debt? The case which I put in the course of the argument is an exception to that rule. If I ask a tradesman or a friend to give me change for a bank note, and he does so, and the bank note turns out to be of no value, it is acknowledged in that case that the loss would fall on the person who asked for the change by way of accommodation. I think there is great difficulty in drawing a distinction between the case where goods are paid for by bank notes at the time of the sale, and where the goods are paid for by bank notes on a future day; or in seeing any difference between paying for goods at the time, when it is supposed that the notes are taken at the risk of the seller, and paying for them two hours after, when it is supposed that the risk is that of the other party. In both

cases there was a sale; and there must always be a moment, previous to payment for the goods, during which the buyer is indebted to the seller. But it is not necessary for us now to give any decided opinion upon that point. This case is decided, upon the grounds which I have stated, in perfect accordance with the cases of *Camidge* v. *Allenby*, (6 B. & Cr. 373,) and *Turner* v. *Stones*, (1 Dowl. & L. 122,) with which I agree; and therefore the rule will be discharged.

Coleridge, J. — Laying out of the case any consideration of fraud, the question is, who is to stand at the loss which the failure of the Stourbridge Bank occasions to the holder of these notes. The defendants ought not to suffer, when they have received the notes under a false impression. And this being the justice of the case, I am of opinion that the law agrees with it. The general rule is, that when a person pays money in ignorance of the facts, he may recover it. I do not mean to say that in this case there was any warranty; but the plaintiffs represented, and the defendants believed, that the notes were worth £5 each. They turn out to be worth nothing. I think there is no distinction, on whichsoever of the counts the plaintiffs rely; in neither case was any money received or any money lent. The notes were *primâ facie* money, and the receipt was *primâ facie* evidence of money lent to or received by the defendants; but it turns out to be a mistake of both parties — the notes turn out not to be money, and the receipt was given under a mistake of fact.

Wightman, J.[1] — I remain of the same opinion which I expressed at the trial, that the plaintiffs are not entitled to recover, either on the count for money had and received, or on the count for money lent, though a count for money had and received would be more applicable than the other, supposing the defendants were entitled to recover. This was a deposit on an accountable receipt, and at the time when the notes were taken they were supposed by both parties to be of the value of £5 each. It turns out that they were not of that value, but, on the contrary, were worth nothing, and that without any default of the defendants; therefore, on the ground of the failure of consideration, the action cannot be sustained, though there was no fraud in the plaintiffs. This differs from the purchase of a bill,

[1] Erle, J., had left the court.

which was the transaction in the cases cited, and therefore they are not relevant. Where notes are given in payment of an antecedent debt, it has been held that if the notes are worthless they are not payment; but if it is a mere case of barter, and the notes are taken over the counter, it may be in the nature of an exchange, and the maxim *caveat emptor* may apply; but that is not applicable to the present case, where the consideration has entirely failed. — *Rule discharged.*

Court of Common Pleas, — November 23, 1852.

FISHER v. RONALDS. P. 393.

Witness — Privilege — Question tending to criminate.

A witness (who was called to prove that a bill of exchange was given for money lost at play) having said that he was present in a room in his own house when the transaction was alleged to have taken place, but that he saw no gaming, was asked, "Was there a roulette-table in the room?" and on being cautioned by the judge declined to answer, on the ground that his answer might tend to criminate him in a prosecution, under the 8 & 9 Vict. c. 109, for keeping a gaming-house: — *Held*, that the witness was privileged from answering.

Semble, per Jervis, C. J., and Maule, J., that it is for the witness to say, on oath, whether he believes the answer may tend to criminate him, and that his decision is conclusive.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange for 245*l.*, drawn by C. Chappell. Plea, *inter alia*, that the bill was accepted by the defendant for money won by the drawer of the defendant by gaming, and that the plaintiff had notice. Replication, *de injuriâ*. At the trial, before Cresswell, J., at the sittings in London during this term, a witness, John Hex, was called on the part of the defendant, who proved that he was a livery-stable keeper at Plymouth: that during the races in August, 1851, certain persons, calling themselves "The Bath and Bristol Club," came down to Plymouth: that Chappell, the drawer of the bill, was one of them: that the witness, at the request of the defendant and other military officers, let them and "the club" have a room in his house: that he was in the room at the time when the money was alleged to have been lost: that some of the club and the officers, and amongst them the plaintiff and defendant, were there, but that he saw no gaming. He was then asked, "Was there

a roulette-table in the room?" Byles, Serjt., (who appeared for the plaintiff), interposed, and referring to the 8 & 9 Vict. c. 109, suggested that the witness was not bound to answer the question, as his answer might tend to criminate himself. The learned judge accordingly cautioned the witness, and the latter declined to answer the question; and the jury found a verdict for the plaintiff.

M. Chambers, Q. C., (*Collier* was with him), (Nov. 23), moved for a new trial. — The judge should not have cautioned the witness, but waited for him to claim his privilege. [MAULE, J. — The judge may use the caution before every answer. In *Lord Cardagin's case* (Gurney, 79) the Lord High Steward cautioned the witness before he had claimed his privilege.] The witness here refused to answer too soon. The ground of his privilege was, that his answer might subject him to be indicted, under the 8 & 9 Vict. c. 109, for keeping a gaming-house. Now, he had already said that he had seen no gaming, and therefore his answer to the subsequent question could not criminate him. [MAULE, J. — In *Reg.* v. *Garbett* (1 Den. C. C. 236) it was urged that the witness had not claimed his privilege soon enough; but the majority of the fifteen judges held that the privilege might be claimed at any stage of the witness's examination. JERVIS, C. J. — And in *Dandridge* v. *Cordon*, (3 Car. & P. 11), Lord Tenterden struck out what a witness had said previously to claiming his privilege; the witness had said that there was no consideration for a bill of exchange, and when asked "How no consideration?" he declined answering, and the learned judge said the case must stand as if the witness had given no evidence.] It was for the judge to decide, as soon as the witness declined to answer, whether the question had a tendency to criminate him; and here that tendency was too remote. [MAULE, J. — It is impossible for any one but the witness to say whether his answer will or will not tend to criminate him. He might be asked the simple question, "Were you in London on a certain day?" and he might decline to answer, knowing that his admission that he was in London on that day was one step towards proving that he committed a murder there on that day. If the judge is to require the witness to point out how his answer will criminate him, the privilege would be worse than useless. How can you say, that, with other circumstances, the witness might not be convicted of keeping a gaming-house?] If the witness is

to be the sole judge, an unwilling or corrupt witness will always be able to defeat justice, if the parties and the court are to be bound by his refusal to answer. [MAULE, J. — Yes; I apprehend that they are bound by the witness's answer. The judge, in fact, never decides the question, but the witness. It is for the witness to say, on his oath, whether he believes the question tends to criminate; and if he does, his answer is conclusive. JERVIS, C. J. — That is so; though no doubt the application of the rule may be attended with difficulty, and possibly with inconvenience.]

JERVIS, C. J. — I am of opinion that my brother Cresswell was perfectly right in interposing as he did, and that there should be no rule. A witness is privileged from answering any question tending, even indirectly, as he *bonâ fide* believes, to criminate himself. This, and the reason for it, is correctly given in 2 Ph. Ev. 417 — "A witness is exempted by privilege from answering not only what will criminate him directly, but also what has a tendency to criminate him; and the reason is, because otherwise question might be put after question, and though no single question may be asked which directly criminates, yet enough might be got from him by successive questions whereon to found against him a criminal charge."

MAULE, J. — I am of the same opinion. If a witness is compellable to answer every question which does not obviously tend to criminate him, a man might be made to prove himself guilty of forgery, or even of murder. It might be proved that a murder had been committed by some one of ten persons in a room, and that a witness was one of the ten. The witness might then be asked, "Did A. do it?" "No;" and so on through all the nine; and then there would be no need to ask him the other question directly tending to criminate him. But in the present case there is no need to have recourse to saying that the question might indirectly tend to criminate the witness; it is manifest to simple common sense that the witness's answer to the question might directly criminate him. The question put was the very one which would have been asked on a prosecution against Hex for keeping a gambling-house. "Was there a roulette-table in the room?" "Yes." "Was Hex there?" "Yes." "Must Hex have seen the roulette-table?" If, therefore, there ever was a case for the interposition of the judge, the present was a most proper one for the application of the caution.

WILLIAMS, J. — I concur in thinking that there should be no rule. It is unnecessary to decide here whether the witness himself is to judge of the tendency of a particular question to criminate him, and whether his simple statement is conclusive on that point; because I think that the question put in the present case evidently might have a direct tendency to criminate the witness.

TALFOURD, J., concurred. — *Rule refused.*

Hilary Term, — January 27, 1853.

ROWE *v.* TIPPER. P. 440.

Bill of Exchange — Notice of Dishonor.

The holder of a bill of exchange, in order to charge an earlier party to the bill, by notice of dishonor from himself, must send him the notice as promptly as if to his own immediate indorser.

A bill of exchange, indorsed by the defendant (an indorsee) to A., and by A. to the plaintiff, became due on a Saturday, and was dishonored; the plaintiff (the holder) gave notice to A. on the Monday, and to the defendant on the Tuesday following: — *Held*, that the notice to the defendant was too late.

DECLARATION on a bill of exchange drawn by one Green on Messrs. Knight & Co., indorsed by Green to the defendant, by the defendant to one Benjamin Abley, and by him to the plaintiff, before it became due. Averment, that Messrs. Knight & Co. did not pay the bill, although the same was duly presented to them for payment on the day when it became due, of all which the defendant then had due notice, &c. Plea, (*inter alia*,) that the defendant had not due notice of the non-payment of the said bill in manner and form as alleged. Issue thereon. At the trial, before Cresswell, J., at the Sittings in London during Michaelmas Term, 1852, it appeared in evidence that the bill in question became due on Saturday, the 15th November, 1851, and was duly presented by the plaintiff, the holder, for payment on that day, and was dishonored; that notice of the non-payment was given by the plaintiff to Abley on Monday, the 17th November; that Abley gave no notice to the defendant, but on Tuesday, the 18th November, one Delorme, to whom the plaintiff had handed the bill, wrote and sent a notice of non-payment, which was delivered to the plaintiff on the same day, all the parties living in London. The learned judge directed a verdict for the defendant on the issue as to the notice of dishonor, with leave to the plaintiff to move to enter it for him.

Hawkins (Nov. 23) obtained a rule *nisi* accordingly; against which

Macnamara (Jan. 27) showed cause. — The notice of dishonor was not in due time. The notice was given on behalf of the plaintiff, and not on behalf of Abley. The time for giving notice is defined by well-established, simple, and uniform rules. The holder has one day after the dishonor to charge any preceding parties to the bill, by giving or sending them notice of dishonor; and they have each one day after receipt of notice to charge their antecedent parties. "The rule is now well settled, that the holder must, in order to subject all the parties to actions at his suit, give or forward all his notices to every one of the indorsers, and to the drawer, whose residences he can ascertain, on the day after the bill or note was dishonored; and and if he omit to give or forward such direct and distinct notice to each, he may be deprived of all remedy against the omitted party, unless some other party to the bill has given him notice of the dishonor in due time; in which case the latter notice will inure to the benefit of any holder." (Chit. & Hulme on Bills, 483.) "If any one party miss a day in duly giving or forwarding notice, without legal excuse, a link in the chain of regular notice is broken, and all the prior parties are *primâ facie* discharged from liability to be sued; nor can any party who has been discharged by such laches safely pay, for he has no right to waive the objection and pay in his own wrong, and thereby charge prior parties; and where there have been several indorsers or transferors by mere delivery, it is not enough that the drawer or indorsers have received notice in as many days as there were subsequent indorsees, unless it appear that each indorsee gave or duly forwarded notice to his immediate indorser in due time after he received notice; and it is no answer, that if notice had been given to each successive indorser in the regular course, the defendant would not have received it at an earlier period. So, if there are several indorsers of a bill, and the last indorsee and holder resorts in the first instance to the first of such indorsers, he is not entitled to as many days as there are indorsers, to give notice of the dishonor to him, but must give it in the same time as he would have been obliged to have done if he had resorted at first to his own immediate indorser." (Id. 490.) *Dobree* v. *Eastwood*, (3 Car. & P. 250,) bears this out; in which case Burrough, J.,

says, "It is not that the holder of the bill has as many days as there are indorsers, but that each indorser has his own day." *Chapcott* v. *Curlewis*, (2 Moo. & R. 484); *Smith* v. *Mullett*, (2 Camp. 208); and *Turner* v. *Leach*, (4 B. & Al. 451,) are also authorities in support of the rule as laid down in Chitty & Hulme; as is *Marsh* v. *Maxwell*, (2 Camp. 210, note,) where Lord Ellenborough ruled, that upon the dishonor of a bill, it is not enough that the drawer or indorser receives notice in as many days as there are subsequent indorsers, unless it is shown that each indorsee gave notice within a day after receiving it. It is, therefore, submitted, that even assuming the notice given by Delorme to have been given as agent for the plaintiff — for if it were not, it would be the notice of a stranger, and would be clearly insufficient, (Chitty & Hulme on Bills, 494) — yet the notice is not a due notice. The plaintiff ought to have given notice to the defendant on the Monday; and the latter is, therefore, discharged from all liability on the bill.

Hawkins and *Duncan*, in support of the rule. — The notice given by Delorme was a good notice by Abley; *Newman* v. *Gill*, (8 Car. & P. 367); and the notice of any party to a bill inures to the benefit of all. *Wilson* v. *Swabey*, (1 Stark. 34.) Abley, therefore, would have been entitled to avail himself of this notice on the 18th, as it was such a notice as Abley himself might have given; and if Abley could sue the defendant, so can the present plaintiff. [Maule, J. — The holder of a bill of exchange is not the agent of his indorser to give notice for him.] Then the notice was a good notice by the plaintiff. All the cases cited on the other side are distinguishable; either there had been greater laches, or the notice was given by an entirely wrong party, or several indorsers had been passed over without notice at all. *Chapcott* v. *Curlewis* is most like this case, and would have been on all-fours with it had notice been given, as here, to the immediate indorser; but there was there no such notice. [Jervis, C. J. — Your argument amounts to this. The defendant, as indorser, is entitled only to notice on a certain day. If he gets it as soon as he would have done in the regular course from indorser to indorser, any break in the chain is of no consequence. Now, *Smith* v. *Mullett* is directly against you, for it expressly decides that such a break discharges all antecedent parties.] Suppose the first

indorser of a bill entitled to notice on the 20th of the month, and he gets it on the 19th, there being some breaks in the chain, how can he be prejudiced, and why should he be discharged? The rule laid down must be a very arbitrary one, and difficult to support on principle. [MAULE, J. — It is a very simple rule. Your fallacy is, that the first indorser is entitled only to notice at the end of a certain number of days, according to the number of subsequent indorsers. That is not so; he is entitled to prompt notice; but there is this exception, that if there are several intermediate indorsers between the holder and the first indorser, and each gives prompt notice to the previous indorser, that is sufficiently prompt notice to the first to make him liable. What is prompt notice depends on the relative distance of the party giving and receiving notice, and other circumstances; though, ordinarily speaking, a man is bound to give notice the next day after he receives notice himself. CRESSWELL, J. — You cannot dispute what Burrough, J., says in *Dobree* v. *Eastwood.*]

JERVIS, C. J. — I am of opinion that this rule must be discharged. I think that the rule applicable to the present case is correctly stated in Chitty & Hulme. If the holder of a bill of exchange seeks to charge a remote indorser, by notice of dishonor given by himself, he must have given it within the time limited for notice to his own immediate indorser, and he cannot avail himself of the laches of an indorser, to whom he may have given due notice, to extend the time; for if this could be done, then, where there are twelve or twenty indorsers to a bill, the holder might wait till the twelfth or twentieth day after presentment, and then give notice to the first indorser; this, it is clear, he cannot do. *Dobree* v. *Eastwood* is expressly in point, that the holder of a dishonored bill must, if he resort to an earlier party to the bill, give him notice within the same time that he would have been required to give it to his immediate indorser. "It is not," as Burrough, J., says, "that the holder has as many days as there are indorsers, but that each indorser has his own day." Each party, after notice to himself, has his own day to give notice to precedent parties, if he seeks to charge them. It is true that the holder may avail himself of notice given in due time by any party to the bill. *Chapman* v. *Keane*, (3 Ad. & El. 193.) Parke, B., in *Harrison* v. *Ruscoe*, (15 M. & W. 334,) recognises that decision, and says, "The notice,

by the terms of the rule, as laid down by the Court of Queen's Bench, must be given in due time by the party to the bill; that is, in due time if he himself were suing." Now, the notice here was the "party's" own notice; was that given in due time? Due notice was given by the plaintiff to Abley, but not to the defendant, who is discharged by this laches.

MAULE, J. — I am of the same opinion. The cases cited for the defendant are not distinguishable, as far as the general rule which they establish, and its application to the present case. That rule is, that any party, other than the acceptor, who is to be made liable on a bill, is entitled to receive notice of dishonor within a reasonable time. What this reasonable time may be, depends on the relative local situations of the parties. Where they live in the same town, it has been held that notice must be sent so as to be received during the day next after the dishonor, or next after the receipt of notice by the party himself who sends the notice. Each indorsee has "his own day." Prompt notice is required, and due diligence must be used; but a man is not bound, the moment he receives notice himself, to abandon all other business, and set about this. He may wait a day to give notice; and, to avoid going into nice distinctions as to what part of the day he received notice, and as to how soon after he might have sent notice himself, it has become an established rule that he may wait till the next day to give notice. The rule is not, however, that each party is to have a day only; he is to have such time as will enable him, with due diligence, to give notice; and if there has been no want of due diligence, no matter what time has been occupied, the notice will have been given in proper time. As between parties relatively situated as the present plaintiff and defendant, sufficient notice of dishonor will have been given if proper diligence has been used by all the intermediate parties. Has that been done here? Abley gave no notice to the defendant, and there was nothing to hinder the plaintiff from giving notice to the defendant in the same time in which he gave notice to Abley; if that time had not been sufficient, with due diligence, then an extension of time would have been given. Due diligence has, therefore, not been used, and the notice is clearly insufficient. I have already said that the cases cited by the defendant, as in point for him, are not distinguishable, and Mr. Hawkins has only at-

tempted to distinguish them on grounds and in particulars which have no bearing on the question at issue here, and which do not affect the general rule to be deduced from them, and which is applicable in the present case. I therefore concur, without any doubt, in the opinion of the Lord Chief Justice, that this rule must be discharged.

CRESSWELL and WILLIAMS, JJ., concurred. — *Rule discharged.*

Miscellaneous Intelligence.

THE CASE OF THE REINDEER. — We take from the N. Y. Legal Observer for June, 1853, the summing up by Judge Betts to the jury in the case of the *United States* v. *Charles W. Farnham*, indicted in the Circuit Court of the United States for the Southern District of New York, for manslaughter, in causing the death of several persons by an explosion of the boiler of the steamboat Reindeer while the boat was landing passengers at Bristol Dock, on the North River. The main clauses of the indictment and the facts put in proof to support them will sufficiently appear in the following summing up of Judge Betts:

"In this case, gentlemen of the jury, you have heard with great attention the testimony offered for the prosecution and the defence, and the arguments of the public prosecutor and the defendant's counsel; and no doubt you are possessed of every fact essential to the merits of the case, both on the part of the United States and the accused.

The indictment was originally framed against two persons, the master and engineer of the steamboat Reindeer; but at the instance of the parties accused, the charges have been severed, and the proceedings are now carried on against the master alone.

Although the character of the event which gives rise to this prosecution, is calculated to excite a deep interest in the community with which you, as citizens, must necessarily sympathize; we may, nevertheless, congratulate ourselves that the case is now presented under such circumstances that the court and yourselves can give to it a calm, dispassionate, and impartial consideration.

It is not disputed but that Capt. Farnham was fully competent to the station in which he was employed. He was an experienced navigator; he had been, more or less, for a long period familiar with the use of steam machinery, and he was skilful and prudent in the discharge of his duties. There is no imputation against him of any improper command or omission, directly relating to this disaster, nor a suggestion that he was guilty of any act intentionally wrong. There was no designed culpability on his part, either of commission or neglect.

Furthermore, although the occurrence was startling and deplorable in the extreme, causing the loss of numerous lives, and filling the whole community with alarm, yet happening more than one hundred miles from this city, and five or six months having elapsed since the shock was experienced, there is no reason to apprehend that you entertain unfavorable prepossessions against the defendant, or any other feelings upon the subject,

than such as are common to the people at large, and are compatible with an unprejudiced judgment upon this case. Nor is there any reason to suppose that you had friends or relatives involved in the calamity, whose sufferings or exposure may appeal to your sympathies to the disadvantage of the accused.

The court, therefore, congratulate you that, on coming to the consideration of this case, you can examine the facts, and pass upon the whole transaction, in a calm and dispassionate frame of mind.

In the first instance, a question of law was raised in behalf of the defendants, whether this court, acting under the authority of the Federal Government, could take cognizance of the case. That question was properly addressed to the court as entirely one of law. The court decided that the laws of the United States govern the subject, and have vested cognizance of it in this tribunal. You will, therefore, not regard that point as before you for consideration; and will proceed upon the issue before you, and dispose of it according to law and evidence: acquitting the accused, if you do not find the charge in the indictment satisfactorily fastened upon him, or condemning him by your verdict if your judgments are convinced that he has committed the offence created and defined by the law.

It has been remarked, by counsel, that this court has no jurisdiction in the case other than what is conferred by the act of Congress referred to. Such is the law. Unless Congress had legislated on the subject, the offence, however heinous, could not be proceeded against here, but would have come under the authority of the State tribunals. Those judicatories might have cognizance of the offence, by force of the common law, without any act of the legislature. But the courts of the United States cannot look to any authority other than the written law, the act of Congress, in relation to this subject, which creates the offence under prosecution, and appoints the mode and extent of its punishment.

It may aid us, in passing upon the facts of the case, to take a slight survey of the objects which Congress had in view in making these enactments. To this end, we may profitably notice the state of navigation by steam in this country, when Congress passed the act of 1838. You are aware, that, as a historical fact, steam had been employed for more than thirty years coastways, and in all the interior waters of the country, and that the use of it was accompanied by many startling disasters, particularly on the western waters; and the destruction of property and loss of life so agitated public feeling, that Congress undertook to enforce regulations in the equipment and navigation of vessels propelled by steam, which might tend to the preservation of life and property exposed to that mode of transportation. The purpose of Congress manifestly was to reach the source from which these evils sprung, and establish rules for their prevention. In order to effect this, provisions were enacted requiring vessels propelled, in whole or in part, by steam, to be sufficiently strong to sustain the weight of the machinery used; directing precautions to be supplied against the hazard of fire in generating steam, and to enforce watchful precautions in the management of the machinery, both to avert explosions and disabling the vessel, as also to secure all practical skill and prudence in navigating it.

You will observe, from this general summary, the leading design of the act of 1838. To give efficacy to these provisions, the act requires every vessel belonging to citizens of the United States to be enrolled or registered, and that no vessel propelled, in whole or in part, by steam, shall be registered without first complying with the conditions designated; and, to compel an enrolment, declares that no such vessel shall navigate the waters of the United States without it; and imposes a penalty of $500 every time a steam-vessel is run without such enrolment. The act points out the

particular qualifications necessary to obtain an enrolment, and, in order to ascertain the sufficiency of the vessel and her machinery, it created a board of inspectors for every revenue district of the United States, designating their duties with great minuteness. They are to examine the vessel, and determine whether she possesses sufficient strength and capacity, and also carefully examine the steam boilers, and see that they are sufficiently strong for the purpose they are to be employed in; and, if satisfied that the vessel and boilers are of sufficient strength, in their judgment, they give a certificate of such facts, without which the collector cannot grant an enrolment.

In this way, Congress intended to provide for a rigid examination of vessels and machinery by officers appointed for that purpose, and thus secure a higher degree of confidence and safety in this most important mode of conveyance.

The law was not, however, limited to measures looking to the strength and sufficiency of steamboats and their machinery alone, but it gave to those requirements the most stringent sanctions, pecuniary and personal, against owners and officers, in order to guaranty the safety of persons and property transported in such vessels.

The regulations to insure the safety of property or remunerate for its loss, need not be specified at large, but will be hereafter adverted to, as explanatory of the penal enactments. They are contained in §§ 7 and 12, which have been read to you.

The indictment in this case is founded on the 12th section, which is in these words: —

'And be it further enacted: That every captain, engineer, pilot, or other person employed on board of any steamboat, or vessel, propelled, in whole or in part, by steam, by whose misconduct, negligence, or inattention to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof, before any Circuit Court in the United States, shall be sentenced to confinement to hard labor, for a period of not more than ten years.'

The indictment charges on the master of the Reindeer the crime of manslaughter, because, by his misconduct, negligence, or inattention at the time and place alleged, the lives of many persons on board were destroyed.

The question at issue is, whether the government have, by legal and sufficient proof, convicted the defendant of the crime of manslaughter.

In the first place, the law does not require the public prosecutor to prove wilful mismanagement or malconduct by the accused. You are not to inquire if he was guilty of intentional negligence or inattention, but only if he did what is forbid by the law. The point of inquiry before you is, whether he is guilty of misconduct, negligence, or inattention, and whether the explosion and destruction of life arose from either of those causes. In order to determine that, we must have a clear and accurate understanding of the meaning of the terms used by Congress in this law.

By misconduct, negligence, or inattention in the management of steamboats, is undoubtedly meant the omission or commission of any act which may naturally lead to the consequences made criminal; and it is no matter what may be the degree of misconduct, whether it is slight or gross, if the proofs satisfy you that an explosion of the boiler was the necessary or most probable result of it.

In order to possess a satisfactory apprehension of the language of the act, it is important to understand what are the duties of the captain of a steamboat, what responsibility he incurs, and when his duty is merged in those of the other officers, and when the responsibilities of the other officers are independent of his.

Was it the duty of the master to see to the state of the boiler, or that proper precautions were taken to relieve it of the pressure of steam when the boat was running or stopped, or did that duty belong exclusively to the engineer?

The practice and opinions of experienced officers and engineers on the subject have been testified to; and it appears that a practice has grown into very common use to allot to the different officers separate and independent trusts and commands; and a general notion is, that it belongs to the pilot to navigate the vessel, independent of the captain; that the engineer, in his special department, is not subordinate to the captain in the performance of his duties. If that was the true construction of the law, the captain would stand discharged of responsibility for all acts of the engineer appertaining to his particular department. There is no foundation in law for such distinction and restriction in the duties of officers of steamboats; they are the same in law as those of officers of other vessels. The master is commander-in-chief. The law entrusts him with the control of the vessel, and every department of service on board it; and the engineer has no more right to refuse obedience to his orders than has the mate. The captain is charged with responsibility for the right performance of all duties appertaining to the command and management of the propelling power of the vessel. If there be misconduct or neglect in the engineer's department, the captain is, by law, responsible for the consequences, both in a civil and criminal prosecution. But if he procures competent persons to perform the duties, and gives them injunctions to do it, the law will not presume him culpable, if they, without his knowledge, neglect the duty assigned to them.

Although the captain may not select or engage the engineer, and the owners, as they have a right to do, employ him and fix the amount of his compensation, yet that circumstance no way deprives the captain of a rightful control over him, in every particular of his service on board. This must manifestly be so, or there could be no unity of command or action in working the vessel.

The notion that an engineer holds his place independent of the authority of the master, and that the latter has no power to restrain him, even if crowding the machinery with a head of steam beyond what the master deemed safe or prudent, has no foundation in law. He has supreme command, in all respects, in directing the navigation of the boat, including control over the head of steam to be used. He is responsible for every misuse or neglect of that authority, and, by the law in question, is made a wrong-doer, answerable as a criminal on indictment, if he omits to interpose and suppress the danger. He is bound to see that all persons, under his command, do their duty properly; and especially this statute compels him, at his personal peril, to be actively awake to the safety of his passengers. It makes no difference, in his favor, if the engineer be the more skilled and competent man in respect to the management of steam; the supremacy of authority is with the master on general principles, and, in respect to specific duties imposed on him by law, he is responsible that proper measures be taken for their performance.

There is no distinction, in law, between the relative duties and responsibilities of different officers, serving upon inland waters or in sea-going ships propelled by steam.

The pilot cannot take a course at his discretion, differing from that directed by the master, nor the engineer raise or keep the steam at a guage beyond what is prescribed by the master, whatever may be the desire or judgment of the engineer in that respect. It belonging to the master, of right, to dictate to his subordinate officers, it will be presumed that what

is constantly done by them, under his observation, is so done by his direction or assent, unless he proves his ignorance, or that his directions have been disregarded.

The great question necessary to be disposed of in this case is, have you a right to regard the omission to raise the safety-valve as an act of misconduct, inattention, or negligence, chargeable upon the master, within the meaning of the twelfth section of the statute?

A learned Judge of an United States Court ruled, on the trial of an indictment of an engineer under this act, for manslaughter, that a boiler having exploded when the safety-valve was not raised, did not afford *primâ facie* evidence of negligence on the part of the engineer. The instruction given to the jury, in that case, was probably placed on grounds not existing in the case before us. The judge intimates distinctly his opinion, that the commission of the offence by the engineer was not made out to his satisfaction.

The statute does not charge the engineer with the duty of raising the safety-valve, and, in that case, accordingly, as it was not his particular duty, but that of the master, to do so, it might, perhaps, be insufficient evidence of a culpable and criminal negligence or inattention to support an indictment against the engineer.

The act is imperative in respect to the master, and imposes the positive duty on him to see that the safety-valve is raised when the boat stops. The omission so to do thus becomes, in respect to him, a direct violation of the law, and has an important bearing upon the meaning and application of the twelfth section.

[Here the judge read the two sections in connection.]

It is not a correct interpretation of the law to understand it as requiring the safety-valve to be raised only in the contingency that the engine has acquired a higher pressure of steam than was raised when the boat was under headway, for that would permit the captain to keep the head of steam during stoppage the same as when coming to the dock, without regard to its state or danger at that time. This would be manifestly in violation of the whole policy of the enactments, because thus a boat might be running under any head of steam, no matter how extreme and perilous, and yet it be maintained at the same height at the dock. The law was framed to promote the safety of the vessel and the property and passengers on board her. The whole purpose aimed at would be frustrated if the boat could be allowed to retain, when stopped, any pressure of steam she could generate whilst in motion. The object of the law was to secure a low state of steam, at all events when the boat stopped; and, to effect this, the safety-valve was required to be opened so as to keep the steam down as near as practicable to what it was when the vessel was under headway. This presupposes that she was running with no more steam than was safe and prudent in the condition of the boiler. It would be an act of misconduct in itself to keep, at any time, a guage of steam on the boiler beyond its fair capacity to bear; and, in addition to that plain obligation implied in the provisions of the twelfth section, Congress superadded the express obligation to raise the safety-valve on stopping the boat, to insure that end.

The course of the defence would seem to imply that the defendant was justified in carrying any amount of steam within the range of fifty pounds to the square inch, which the certificate of the inspectors suggests the boilers would bear.

But the jury will observe that the inspectors have no power to dictate what amount of steam, whether forty or fifty pounds, more or less, may be used, or to compel steamboat owners or masters to follow their advice

in that respect. It was wise and prudent in them to counsel parties on that subject; but this was only advisory and cautionary; they had no power to compel obedience to it.

Nor was their opinion backed by facts which could give to it any special importance. They had no authority to test the sufficiency of the boilers by steam, or hydraulic pressure, to ascertain whether they could bear fifty or ten pounds' pressure to the inch.

Moreover, these inspections are required to be made each six months. In this instance, the period for re-inspection had nearly come round, and that would be a further caution to the officers of the Reindeer to be vigilant and prudent, and not rely upon the opinion of inspectors, given months before, as to the safety and sufficiency of the boilers.

The testimony also affords reason to believe that, during the time since the last inspection, the boat had been running in active competition with others, all which would tend to overstrain and weaken the machinery, and render less and less reliable and trustworthy the opinion of inspectors upon her former condition and strength.

The condition of things is necessarily incident, to a greater or less degree, to all boats in use; and, therefore, it is not to be implied that Congress intended to take the height of steam put upon boilers whilst the boat was running, as the measure of what might be retained when she stopped. It would be to abrogate the beneficial object of this feature of the law so to construe it. The whole scope of the enactments show that Congress intended that steam-vessels should, at all times, be restrained to the use of no more steam than was compatible with entire safety; and the particular provision in question aims to fulfil that general intention by guarding against an accumulation of steam when the vessel is at rest.

Masters and engineers would be responsible under the common and local law for putting on an unsafe amount of steam in running boats, and, without giving further sanction to that law, by inflicting fine or punishment under the United States' authority for its violation, Congress limited their positive enactments, in this particular, to an absolute injunction that the safety-valve should be raised whenever the vessel was stopped.

The new law, which goes into effect in a few days, is more ample and efficacious, both in ascertaining the actual strength of boilers, and in compelling a prudent use of them when the boat was in motion.

The first question for the jury to consider and determine is, was the vessel under a prudent and safe head of steam at the time she was stopped at the landing, together with a sufficient supply of water? And next, whether the omission to open the safety-valve, at that time, was a cause of the explosion.

A ground of defence, taken on this branch of the case, is, that the safety-valve is required to be raised only as a means for lowering the steam in the boiler, and the method pointed out in the act need not be adopted if other and better means are employed for effecting the same end. And it is contended the defendant has clearly proved, from universal practice and the judgment of skilful and experienced men, that when coal is used for fuel, steam in the boiler is more speedily and certainly reduced and made safe by opening the furnace and flue-doors, than by raising safety-valves.

I do not, however, so interpret the statute, as leaving it optional with the master to adopt that course or substitute another. I think it peremptory, and that the master has no right to deviate from that particular requirement. The plain language of the act must govern. This the master is bound to obey. Congress has the like power to dictate in this particular, as in that of the enrolment or inspection of steam-vessels before

they could be allowed to run, and, in either case, subject owners and masters to penalties for disobeying the prohibition.

And even in respect to the propriety of this enactment, and its fitness to secure the end proposed, its inutility or inferiority to other methods cannot be certainly determined upon the opinions or theories of experts. Men of any particular profession or craft do not like to be controlled in their callings by legislation; lawyers, doctors, or mechanics are apt to think they can manage their particular business better without, than under the direction of legislators. Engineers would not be inclined to think Congress understands the management of steam so well as themselves; or that its rule, in that respect, was entitled to much consideration when conflicting with their own opinions and practices. But it cannot be necessary to say more on this head, than that such speculations can have no place here. We must accept the national will, expressed in the law, as fixing the method which must be observed and adhered to. Besides, it is by no means made clear, upon the evidence, that the usage of opening the doors of the furnaces relieves the boilers sufficiently, or that the idea is an erroneous one which induced Congress to require safety-valves to be always opened for discharge of steam when the boat should be stopped. After an experience of twelve or thirteen years, Congress appears to adhere to the same opinion; and, in a few days, a law will go into operation compelling steamboats to have not only one but three safety-valves ready for use; one of which shall be self-acting, and out of the power of the captain or engineer to control, so that it opens at a particular point of steam, whatever other means are in use to keep that down. Nor do I think the engineers express themselves decidedly of opinion that opening the doors of the furnaces and flues can always be relied upon as sufficient, nor but that, under many circumstances, it will be necessary to open the safety-valves also, especially if there be a deficiency of water in the boilers.

It seems to the court plain that the object Congress had in view, in this provision, was to compel masters to have the safety-valve opened when a boat stopped, without regard to other measures which might be likewise employed to prevent an explosion.

If experience demonstrated the law to be useless or improvident, and that additional danger was incurred by raising the valves, the legislature should have been appealed to for a repeal or modification of it, that the masters need not be compelled to use means calculated to increase dangers instead of warding them off. The legislative will must govern; and that declared by this law must be obeyed until a different one is substituted by Congress. But if we may judge by the late enactment on the subject, there has been no change of legislative opinion on that question. It is no matter what may be the inconvenience or expense to the owners, or what delay it may cause in the progress of the boat; it is your duty, equally with that of the court, to hold masters of steamboats to a strict obedience to the direction of the legislature, and to regard an intentional deviation from it a fault. Whether such neglect or misconduct be of a criminal character, will be more particularly considered hereafter.

The excuse set up for the master in this instance, that he was occupied with other duties of his command, cannot avail as a defence, because it was no way necessary he should be personally at the engine and raise the valve with his own hand. He would stand acquitted of blame if he had laid express commands on the engineer and his assistants to see that it was done at every stoppage. He is not permitted to leave this duty to the judgment and discretion of the engineer, even if he have more skill and experience than the master himself.

The crime created by the statute does not rest upon any wrong intention of the officer subjected to indictment. As regards the defendant, in this case, he is not accused of any wilful misconduct or design to injure the vessel or any person on board, or to put either in danger. The indictment is not placed upon that ground. You will examine the evidence, and see whether you can fairly imply from it that the captain had given proper orders for the safety-valve to be raised when the boat stopped; and, if not, you must regard his omission to take that precaution legal evidence of misconduct, negligence, and inattention, tending to support the indictment.

In order to convict him, the district attorney must prove some act of negligence or omission. It must be shown that he has omitted to do something which it was incumbent on him to do in fulfilment of his duty, or that he did something to counteract his duty.

[Reference to thirteenth section.]

The mere circumstance of the valve not having been raised, is not to be taken by itself as proving the crime charged against the captain. The essential question is, not whether the evidence shows that the captain was negligent of his duty, but whether the explosion was caused by the particular negligence proved; that is, whether the proof satisfies your judgment that the omission to raise the valve was the proximate cause of the explosion, and death of the persons destroyed. But, in examining this point, it is not important to ascertain what was the actual state of the boiler. If it was insufficient, from some inherent defect, at the time it was inspected, or had afterwards become so from use, and there was nothing discernible by reasonable attention and diligence to indicate any defect, and if, furthermore, it should appear that such defect was the cause of the explosion, then the defendant cannot be made responsible, criminally, for consequences arising out of circumstances not within his knowledge or control. It is necessary for you to consider this branch of the case carefully, and if it appears, upon the evidence before you, that this boiler must most probably have exploded with a cautious use of steam, and that it was not safe, under such circumstances, the accused ought to be acquitted of the crime charged upon him by the indictment.

It is incumbent on the jury to weigh considerately the proofs bearing upon this point, and to be satisfied there was no more than a reasonable head of steam upon the boiler at the time of the explosion; for latent defects in that, will afford the master no protection if he allowed an improvident and unsafe pressure of steam to be then generated. The defendant is called on to answer for his negligence or misconduct in that particular, but not for an explosion arising from other causes. The only direct proof of any act of misconduct, negligence, or inattention by the defendant, is his omission to have the safety-valve raised at the time it was, by statute, made his duty to raise it; but you must connect with that, and consider all other circumstances in evidence attendant upon the catastrophe, or directly preceding it, and judge from the whole evidence whether, by that omission, he is guilty of the offence charged upon him. If, on a full consideration of all the facts and circumstances laid before you by the testimony, you are unable to determine, to the clear satisfaction of your judgment, what was the immediate cause of this disaster, and the appalling destruction of life attending it, or if, on such review, it remains doubtful in your minds whether the explosion was occasioned by any culpable inattention or negligence or misconduct of the defendant, then, in either of these events, he is entitled to your acquittal.

In submitting this case to your judgment, the court, gentleman of the jury, reposes the most entire confidence in your intelligence, discretion,

and sagacity, and is persuaded that the issue, so deeply affecting the defendant and the public, will be determined by you according to the LAW and the FACTS."

The jury retired at half-past twelve o'clock, and, about six o'clock, came into court, saying they could not agree; and the jurors requested a further explanation of the seventh and twelfth sections of the act of Congress.

Judge Betts read the two sections to the jury, and remarked that, the command of the seventh section being positive, that the masters shall open the safety-valve on the stoppage of the boat, it is an act of misconduct and negligence in him to leave it to the option of the engineer to open the valve or not, at his discretion. It was the duty of the master to give explicit orders that the statutory direction, in this respect, be strictly obeyed. The true construction of the law does not authorize the master to keep the safety-valve down whilst the steam is no higher, on stopping the motion of the boat, than when she is under headway, if she was running under an unsafe pressure. The law does not authorize the master to keep on a head of steam, when the boat is stopped, which was dangerous when she was under headway.

The twelfth section does not declare that the particular act of misconduct or neglect, in keeping down the safety-valve when the boat is stopped, is a criminal offence; but it becomes so under that section, if the omission to open the valve, at the time, caused the explosion of the boiler. If the jury are satisfied, upon all the evidence, that an improper and unsafe force of steam was kept on the boiler, and that it exploded from that cause, and of the further fact, that, if the safety-valve had been opened when the boat was stopped, the danger would have been avoided, then, as before remarked, the master's disobedience of the seventh section, in that respect, would be legal evidence against him under the twelfth section. That disobedience is not declared to be, of itself, a crime; but yet, if it causes the death of a person on the boat, it may prove the misconduct or negligence made criminal by the twelfth section.

Whether it had that effect or not, is wholly matter of fact for the jury to decide.

The jury then returned to their room, and, after an absence of one hour, returned into court, stating their inability to agree on a verdict.

By consent of counsel, on both sides, the jury were discharged without rendering a verdict.

THE RAILROAD TAX QUESTION. — A case has recently been decided in the Supreme Court of Louisiana, which excited a great interest in the people of the State, as it affected directly the matter of internal improvements within the State. The case is that of *The Police Jury, Right Bank of Parish of Orleans, for the use, &c.* v. *Succession of John McDonogh*; and the opinion of the Court was given by Chief Justice Slidell. The main question was the constitutionality of the Act of the Legislature of Louisiana of March 12, 1852. This act authorized police juries and municipal corporations of the State to subscribe on certain conditions to the stock of corporations undertaking works of internal improvement under the laws of the State. These conditions were, that the ordinance passed for such subscriptions should contain a statement of the number and amount of the shares proposed to be subscribed; that it should levy a sufficient tax on the landed estate situate in the parish or municipal corporation, specifying the rate of taxation, and the periods when it is payable; that no such ordinance should take effect until submitted to and ratified by a majority of the voters on whose property the tax is proposed to be levied, at an

election held specially for the purpose, and advertised for thirty days in the newspapers in the parish; and if the ordinance is not passed at the first trial, subsequent trials may be had, at intervals of not less than six months; that the stock subscribed under this act by virtue of the ordinances, should not belong to the parish, but to the tax-payers who shall have paid therefor, and the tax-receipt of each tax-payer should entitle him to a certificate transferrable by delivery from the corporation to which subscription has been made, for an amount equal to the amount of his tax paid. The suit was brought by the parish, to collect the amount of the tax assessed on lands within its jurisdiction, to meet its subscription to the stock of the New Orleans, Opelousas and Great Western Railroad Company, under an ordinance in which all the above conditions had been complied with. The answer of the defendant raised the question of the constitutionality of the statute and ordinance. To obtain more speedily the decision of the Supreme Court, a *pro forma* decree was entered for the defendant and an appeal taken. The case was argued most elaborately on both sides, and the opinion of the court was formed with great care and deliberation.

The court decide, that the right of the legislature to delegate the power of taxation for local purposes to municipal authorities is established by an uninterrupted train of legislative precedents and judicial decisions. But it is objected that in the present case the tax was not for a local purpose. This objection is overruled, upon the authority of *Goddin* v. *Crump*, (8 Leigh, 120,) where the improvement of the James and Kanawha rivers was considered, as regards the city of Richmond, a local purpose, by reason of its connection with the commercial prosperity of that city; of *Nichol* v. *The Mayor of Nashville*, where it was held that the legislature of Tennessee could authorize the corporation of Nashville to take stock in the Nashville and Chattanooga Railroad; of *Talbot* v. *Dent*, (9 B. Monroe, 526,) and of *Commonwealth* v. *Williams*, (1 Jones, 71.)

The general power of the legislature to delegate to local political corporations the power to levy taxes of this nature being established, the court proceed to inquire whether the conditions with which this grant of power is accompanied vitiate the grant; whether any invasion of the constitutional rights of individuals is involved in the peculiar mode in which the exercise of the power delegated is commanded to take place! Does the submission of the ordinance to the approval of the tax-payers make it unconstitutional? The court say, "If the legislature can constitutionally confer on the Police Jury authority to pass a taxing ordinance, it would seem rather a safeguard against oppression than the reverse to qualify the power by requiring it to be exercised with the approbation of a majority of those who are to bear the burden." They cite and rely on the cases of *Burgess* v. *Pue* (2 Gill. 19); 7 Western Law Journal, 220; *Parker* v. *Commonwealth*, (6 Barr. 507); 8 Ib. 395; 10 Ib. 216; *Rice* v. *Foster*, (4 Harrington, 495.) The court also refer to the Acts of Congress of 9 July, 1846, in which the question of the retrocession of the town of Alexandria to Virginia was submitted to the people of that place; and to several Acts upon the statute book of Louisiana. They add, "It seems to us a matter of surprise, that the caution of the legislature in its grant of the taxing power should be made a subject of reproach. We think, on the contrary, there was a praiseworthy discretion in thus allowing the voice of the people of the respective parishes to be expressed, instead of authorizing the local authorities to conclude definitely the imposition of a burden for a novel and untried purpose.

Another objection was made, that although the Police Jury might subscribe for stock for itself, it could not subscribe for stock for any one of the

inhabitants in their individual capacities; that the intent and effect of the law is to force individuals to take and pay for stock in a railroad whether they wish it or not, whether they think the enterprise likely to be beneficial or not; and that such a proceeding is mere spoliation for the benefit of a private corporation.

To this it is replied, that the purpose of the law was to enable political corporations to aid, by taxation, the completion of public improvements which it was supposed by the legislature would redound to their local advantage. The burden imposed was a tax, with regard to which each citizen has not a right to decide authoritatively for himself alone, whether the tax is for a useful purpose, and will redound to his individual advantage. If each citizen can be permitted to complain that his tax has been increased without his individual assent, and for a purpose which he individually disapproves, all government would be at an end. It is the good of the community to which we belong which warrants a tax affecting our property. Of this public good the legislature, in taxation for general purposes, and the duly constituted local authorities, acting under the express will of the legislature, in a local sphere, and for local purposes, are the judges. The argument for the defendants confounds two distinct powers, — the power of taxation, and the power of taking private property for public use. In the latter case, previous compensation must be made. In the former, though in taking a man's money for taxation you do take his property, the compensation is considered as simultaneously given in the benefit which, as a citizen, he enjoys in common with his fellow-citizens in the public welfare and the public prosperity, to the advancement of which the money is to be applied. Such is the theory of taxation. It may be abused, but its exercise cannot be judicially restrained so long as it is referrable to the taxing power. See *Thomas* v. *Leland*, (24 Wend. 69,) and the opinion of Chief Justice Marshall in the case of *The Providence Bank* v. *Billings*, (4 Peters, 563.)

The objection made to the law upon the ground that the stock subscribed for by the respective Police Juries is to go to the tax-payers, as provided in section fourth, seems to us untenable. In the understanding of practical men this is surely no grievance. Its manifest object was to lessen the burden of the tax-payer. If the stock should prove worthless, it imposes no additional burthen upon the holder, it involves him in no further responsibility. But if the stock should prove valuable, such value would be so much virtually taken from the burden of the tax. It is somewhat of an anomaly for the governing power to levy a tax for a particular purpose, and at the same time reimburse him by a transfer of the thing paid for by the tax; still, if the government were under a valid obligation to pay and had the right to meet this obligation by a tax upon its citizens, a contribution ratably assessed and levied for this public object upon all the property of the citizens, would not lose its character of a tax, nor be less obligatory upon individuals, because the payment of it would entitle them respectively to corresponding portions of the thing for which the government had contracted the debt or obligations, for the discharge of which the contribution was required.

We may add, that it is a fact notorious in the present history of our country, that this principle has been resorted to in many parts of the Union, and was recommended in the Railroad Convention which assembled in New Orleans from all parts of the State before the passage of the law of 1852.

We have thus examined the points which have been presented by the defence. We are of opinion that they are all covered by decisions of the tribunals of our sister States, the rights of whose citizens are controlled

and protected by constitutions similar to our own. With the assistance of these lights, and elaborate arguments of the counsel on both sides, we have applied the test of our own constitutions to the statute of 1852, and the ordinance set forth in the petition, and we are unable to discover any constitutional ground for exempting the defendant from the payment of the tax for which the suit is brought."

A separate opinion was given by Justice Ogden, upon another point in the case. It was urged that "By the constitution, the jurisdiction of the Supreme Court is appellate only, and that by entertaining this appeal from a *pro forma* judgment rendered by agreement in the court below, the court would be substantially entertaining the original jurisdiction that is denied by the constitution; and the case of the *United States* v. *Stone*, (14 Pet. 524,) was relied on as authority. But the court held that they could exercise a discretion in entertaining appeals from *pro forma* judgments rendered by consent in such a case as this. See the cases of *Legendre* v. *M'Donogh*, (6 N. S. 514); *Fulton's Heirs* v. *Welsh*, (7 N. S. 257); *Municipality No. 2* v. *Duncan*, (2d Annual Rep.)

Blackstone. — A writer in the London Law Magazine for May (1853), in an article upon the third edition of Stephen's Commentaries, speaks thus rampantly of the venerated author.

"It is sheer nonsense to talk of the worth of Blackstone now-a-days. We undertake to say, that the student who should read him now would have to unread half the work contains, and add as much more to his information when he had exhausted all that Blackstone knew. This results not merely from the changes which have since taken place, but from the diffuse and often verbose style in which Blackstone wrote his very faulty work, which it has been the fashion of a comparatively illiterate age to laud and extol. We venture to suggest to Serjeant Stephen to discard Blackstone altogether, and to re-write the passages he has modestly, but injudiciously, interpolated, in his own infinitely superior composition. We need not remind him of a divine maxim, as to the piecing of an old garment with new patches; and we believe the patching of the new with the old a resource, if possible, still sillier. Every one laments the disfigurement of the book, resulting from the unsightly right-angled parenthesis marks, which botch nearly every page of Mr. Roworth's neat typography. Moreover, parenthesis marks have another signification appropriated to them, and do not mean 'copied from Blackstone,' or ever have the effect of quotation marks. They should not, we think, be wrested from their proper signification. But we readily admit that these are quite minor objections. The chief objection is, that what Blackstone wrote is infinitely inferior to what Serjeant Stephen could write; and yet he treasures up the smallest bits of Blackstone, as if they were precious stones to be set in metal of inferior value; or as the choicest gems in mosaic. Here is an example; the bit in brackets is from Blackstone: —

'A surrender [is done by these words, "hath surrendered, granted, and yielded up,"] or the like.'

Why Serjeant Stephen could not have expressed what is stated within these brackets without the formality of quoting them from his prototype, we cannot guess. Was he tempted by the beauty of the term 'done'? Its accuracy could hardly have charmed him; for most unquestionably the surrender is *not* 'done' by the words cited, though those words declare it, and give it effect. It is really carrying one's idolatry a little too far to patch in Blackstone's blunders and crudities.

Here is another: —

'The next disability (for marriage) is want of age. This is sufficient

to avoid all other contracts, on account of the imbecility [of judgment in the parties contracting; *à fortiori*, therefore, it ought to avoid this, the most important contract of any.] The age for consent to matrimony is fourteen in males, and twelve in females.'

The interpolation is unfortunate, and the 'à fortiori' remark inconsistent with the context; for if it be *à fortiori* needful that the contracting parties to a marriage be of mature age, how comes it that, while a young man is not old enough to contract for a box of cigars at twenty, he may nevertheless contract for a wife at fourteen?

The *à fortiori* argument establishes the exact reverse. The canon law shows that the maturity of the judgment is really less concerned than the ability *ad matrimonium;* and the whole argument on the civil law is a mistake which had been better veiled. Blackstone's blunder, at any rate, need not have been introduced to blur the passage.

Let us now give specimens of the style which Serjeant Stephen so sedulously cherishes, that he hoards fusty fragments like these: —

'And here it is to be observed, that the [land so escheating afterwards follows the seignory, as being a fruit thereof. Therefore, if the lord was entitled to the seignory by purchase, the land escheated will descend to his heirs general; if by descent, they (*sic*) *will be inheritable only by such of his heirs as are capable of inheriting the other.*']

To persons who already know the law of escheat this is intelligible, simply because they understand it already; but we think we may defy any novice in law to construe such a crabbed, ill-expressed sentence. Why on earth Serjeant Stephen did not write this in his own clear style, we are indeed at a loss to conceive. It is refreshing to turn to his own composition after so nauseous a dose — homœpathic though it be — of grim old Blackstone."

. . . . .

"We must close this brief notice of this invaluable book with one more word on the expediency, on all scores, of omitting from the next edition any further reference to Blackstone than such as brief notes may supply. It would not occupy more than a few months, were Serjeant Stephen to re-write the fragments in his own clear style, which he has so unadvisedly borrowed from Blackstone. Whatever may be the opinion of men of antiquated predilections regarding that obsolete commentator, we can assure Serjeant Stephen, that there is no question that patches of Blackstone are no improvement to new commentaries. The Serjeant's book (for such substantially it is) is much deteriorated by the attempt to introduce them. It is not only clumsy in appearance, destructive of uniformity of style and coherency of thought, but even the Serjeant is compelled to announce, in his preface, 'that fundamental alterations have been made in the manner of treating' some parts of the subject, even where these quotations have been nevertheless retained.

The objections to an edition entirely discarding Blackstone, are stated in the preface; but as they consist only in unmerited eulogies and unsupported assertions of the 'grace and spirit of Blackstone's diction,' — his 'merit of the highest order,' — his 'affluence of learning,' &c. &c., — it suffices to remark that no one else thinks so. Nor is any one but the modest author of this work — so immeasurably superior to the old commentaries — of opinion that 'he cannot reasonably hope to rival their excellence.' He could not by any possibility descend to their pompous platitudes, their comparative poverty of thought, their obscure style, inflated verbosity, faulty phraseology, or unpardonable omissions; defects by which they are now indelibly characterized, however true it is that they did good service in times, happily past, of meagre jurisprudence and jejune intellect."

THE FUGITIVE SLAVE LAW (Act of Sept. 28, 1850,) NOT APPLICABLE TO APPRENTICES. — There have been two or three decisions, one in Connecticut, and one in Boston by Mr. Commissioner Loring, by which runaway apprentices were restored to their masters under the provisions of the Act of Sept 28, 1850. But Mr. Commissioner Morton, of New York, has very recently given his decision the other way. In the case of John Van Orden, pending before him, the evidence showed that the person claimed as a fugitive from service was an apprentice, under voluntary contract by indenture, to learn the making of shoes, and came to New York without permission and refused to return, and he held that this did not describe a person held to labor within Art. 4, § 3, of the Constitution, and the Acts of 1798 and 1850. He also held that, following the case of *Prigg* v. *Pennsylvania*, (16 Pet. 539,) it was impossible to decide "otherwise than that apprentices are wholly excluded from having been within the intention of the framers of the constitution."

IMPRISONMENT OF COLORED SEAMEN IN SOUTHERN PORTS. — In our May number we referred to a suit that had been instituted in the United States Courts in the district of South Carolina, at the suggestion of the British Consul, Mr. Mathews, against the sheriff of Charleston, to test the validity of the laws of the State in relation to the imprisonment of colored seamen; that a decision had been given adverse to the plaintiff, and an appeal taken to the Supreme Court of the United States. But the validity of the statutes seem now to be as far from settlement as ever, for the newspapers state that Mr. Mathews, probably acting under instructions from his government, has withdrawn his appeal, and dropped the suit.

SALOMONS *v.* MILLER. — The construction of the English statute concerning the oath of abjuration, has been settled in the Exchequer Chamber by the unanimous opinion of the Judges. This was an action against Alderman Salomons, the defendant below, for penalties incurred under stat. 1, Geo. I., ch. 13, § 17, for having voted as a member of Parliament without having taken the oath of abjuration. We have given an account of the decision in the court below (XV. Law Reporter, 114). Upon the decision of the majority of the court in that case, a writ of error was brought, and a hearing was had thereon before Lord Campbell, C. J., and Coleridge, Cresswell, Wightman, Williams and Crompton, Justices, on the 10th and 11th May. The Chief Justice delivered the opinion of the court. There were two objections taken to the judgment of the Court of Exchequer. The first was, that the oath of abjuration no longer exists; that the abjuration act ceased upon the death of Geo. III., or at all events upon the death of Geo. IV. But the court hold, that the new construction is that the oath should be taken, not merely to a sovereign upon the throne, of the name of George, but that "the Act was introduced to denote that in all time to come until the law should be altered, the oath of abjuration should be taken to the sovereign upon the throne." The second objection was, that the words, "Upon the faith of a Christian," were not an essential part of the oath: that the rule to be applied is the one laid down in *Omichund* v. *Barker*, (1 Atk. 21, Willes, 518,) that the only question as to the manner of taking the oath, is that it shall be taken in the form which is most binding upon the conscience of the taker. The court however decide, that the question is not what form is most binding on the conscience of the taker, but what was the intention of the legislature as expressed in the Act. The intention was, that no one should be allowed to take the oath who cannot or will not say he does so upon the faith of a Christian. The court, in delivering their opinion, declare the case "to be free from doubt." Lord Campbell, in conclusion, expressed himself as follows — "My own individual desire is that the Act in ques-

tion may be repealed, and I have again and again declared so by my votes in both houses of Parliament; but I sit here to declare the law, and put the best construction, according to my abilities, upon the Act, and doing so, I have no doubt that, according to the existing law, Jews are excluded from sitting in either House of Parliament."

Notices of New Books.

A Treatise on the Law of Insurance. By Willard Phillips. In two volumes. Third edition. Vol. I., pp. 705; Vol. II., pp. 744. Boston: Little, Brown & Company, 1853.

The first edition of this work was published in 1823 in a single volume. In 1834 an additional or supplemental volume was published, containing the cases reported subsequently to the date of the former one, and also the legal proceedings upon policies. A second edition of the work was published in 1840, in which the original volume and the supplement were incorporated. This edition was in two volumes. It would be interesting to trace the development of the law of Insurance from the time of the publication of the first edition of this work to the present day; but such a course would be more fit for a review than for a notice of a new book. The volumes themselves, however, very nearly supply the material, and our readers, or such of them as are not already familiar with the subject, will doubtless trace out the changes for themselves.

Mr. Phillips' work is now so generally known and appreciated, that a statement of the general method of the book is unnecessary. Some changes, however, have been made in this edition, — as the author states in his preface, — to give more facility to students in their elementary reading, and to professional gentlemen and underwriters in consulting the work. These changes consist in the statement and arrangement of the subdivisions, and the illustrations of particular doctrines. Its use and adaptation as a text-book has also been kept in view, partly from the consideration that it is convenient for the practising lawyer to have studied, as a learner, the same elementary book which he uses in practice. In cases of diversity or conflict of decisions as well as of disagreement among jurists of authority, Mr. Phillips gives a direct expression of his view of the better doctrine with his reasons therefor, in all matters of any considerable importance.

We are glad to know that this treatise of Mr. Phillips is so well received by the profession. We know of no work upon the subject of insurance, which meets so fully the wants of the student and the lawyer. The leading principles are distinctly and clearly enunciated in logical order, and the leading decisions of the courts are given with sufficient fulness. They do not overload the text, and they illustrate and support the doctrinal proposition to which they are cited.

To such of our readers as have not read the work, we commend it as a most useful book.

English Reports in Law and Equity, &c. Edited by Edmund H. Bennett and Chauncey Smith. Volume XIII, pp. 650, containing Cases in all the Courts of Equity during the year 1852. Boston: Little, Brown & Company, 1853.

This volume of this excellent series of reports, as the title indicates, contains only cases in Equity, and the publishers announce that hereafter each odd volume will contain all Chancery cases; also that volume XIV. and each future even volume will contain only cases at Law.

New Publications received.

THE STATE OF MISSISSIPPI *v.* HEZRON A. JOHNSON, involving the validity of the Bonds issued by the State of Mississippi for and on account of the Mississippi Union Bank. Abstract and argument of Adams & Dixon for H. A. Johnson, appellee. Jackson, 1853.

THE POLICE JURY OF THE PARISH OF ORLEANS. Right Bank *v.* The Executors of John McDonough, in the Supreme Court of Louisiana. Brief of the Counsel of the defendants and appellees, Messrs. Durant & Hornor.

THE ELECTRIC TELEGRAPH. Substance of the Argument of S. P. Chase before the Supreme Court of the United States for the appellants in the case of H. O'Reilly and others *v.* S. F. B. Morse and others. An appeal from the Circuit Court for the District of Kentucky. New York: Baker, Godwin & Co., Printers, 1853.

DE BOW'S REVIEW. Industrial Resources, &c., June, 1853. Vol. XIV., O. S. Vol. I., N. S. No. 6.

THE POPULAR EDUCATOR. May, 1853. Vol. I. No. 1.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Bailey, Francis M.	Lowell,	May 18,	Isaac S. Morse.
Bessy, Marshall,	Springfield,	" 16,	Henry Vose.
Bradley, John N.,	Boston,	" 16,	Frederic H. Allen.
Clarke, Elijah L.,	Weymouth,	" 21,	Samuel B. Noyes.
Craig, John F.,	Stoughton,	June 1,	Samuel B. Noyes.
Crouch, Jonathan,	Harvard,	May 19,	Henry Chapin.
Cummings, Willard,	Worcester,	" 6,	Henry Chapin.
Daniels, Horace,	Paxton,	" 28,	Henry Chapin.
Dubois, Gilman B. et al.,	Boston,	" 17,	John M. Williams.
Emerson, Sylvanus,	Hanson,	" 17,	John J. Russell.
Filley, Chloe,	Greenfield,	March 14,	David Aiken.
Fitzpatrick, Nicholas P.,	Boston,	May 27,	John M. Williams.
Flanders, Isaac E.,	Charlestown,	" 24,	Asa F. Lawrence.
Gilbert, Lucius J.	Sunderland,	March 14,	David Aiken.
Gouch, John,	Cambridge,	May 9,	Asa F. Lawrence.
Guptill, John A.,	Chelsea,	" 26,	John M. Williams.
Hayden, P. H.,	Boston,	" 10,	Frederic H. Allen.
Hobart, Edward, et al.,	Boston,	" 17,	John M. Williams.
Holden, Nathan W.,	Malden,	" 5,	Josiah Rutter.
Houghton, Samuel S.,	Melrose,	" 30,	John M. Williams.
Johnson, Artemas N.,	Chelsea,	" 19,	John M. Williams.
Jones, Russell L.	Coleraine,	March 16,	David Aiken.
Kingman, Amos W.,	Weymouth,	May 27,	Samuel B. Noyes.
Laird, Robert,	Boston,	" 16,	Frederic H. Allen.
Lang, Roger,	Lowell,	" 31,	Isaac S Morse.
Leonard, Nathaniel W.,	Middleborough,	" 30,	Welcome Young.
Manning, Samuel D.,	Wareham,	" 10,	Welcome Young.
Rich, Obedaiah,	Cambridge,	" 17,	Isaac S. Morse.
Sawyer, Charles L.	Wendell,	" 9,	David Aiken.
Smith, Joseph,	Cohasset,	" 11,	Samuel B. Noyes.
Snell, Orlando,	Lowell,	" 31,	Isaac S. Morse.
Tolman, Daniel,	Sterling,	" 21,	Henry Chapin.
Williams, Horatio,	Medford,	" 30,	Asa F. Lawrence.
Winch, John,	Framingham,	" 5,	Josiah Rutter.
Wyman, Hiram D.,	Springfield,	" 30,	Henry Vose.

LAW SCHOOL OF THE UNIVERSITY AT CAMBRIDGE.

THE INSTRUCTORS IN THIS SCHOOL, ARE

Hon. Joel Parker, LL. D., Royall Professor.

Hon. Theophilus Parsons, LL. D., Dane Professor.

Hon. Luther S. Cushing, LL. B., University Lecturer.

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The course of instruction for the Bar embraces the various branches of the Common Law; and of Equity; Admiralty; Commercial, International, and Constitutional Law; and the Jurisprudence of the United States.—Lectures are given, also, upon the history, sources, and general principles of the Civil Law, and upon the theory and practice of Parliamentary Law.

The Law Library consists of about 14,000 volumes, and includes all the American Reports, and the Statutes of the United States, as well as those of all the States, a re gular series of all the English Reports, the English Statutes, the principal Treatises in American and English Law, besides a large collection of Scotch, French, German, Dutch, Spanish, Italian, and other Foreign Law, and a very ample collection of the best editions of the Roman or Civil Law, together with the works of the most celebrated commentators upon that Law.

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The applicant for admission must give a bond, in the sum of $200, to the Steward, with a surety resident in Massachusetts, for the payment of College dues; or deposit, at his election, $150 with the Steward, upon his entrance, and at the commencement of each subsequent term, to be retained by him until the end of the term, and then to be accounted for.

Students may enter the School in any stage of their professional studies or mercantile pursuits. But they are advised, with a view to their own advantage and improvement, to enter at the beginning of those studies, rather than at a later period.

The course of studies is so arranged as to be completed in two academical years; and the studies for each term are also arranged, as far as they may be, with reference to a course commencing with that term, and extending through a period of two years; so that those who are beginning the study of the law may enter at the commencement of either term, upon branches suitable for them. Students may enter, also, if they so desire, in the middle, or other part of a term. But it is recommended to them to enter at the beginning of an Academical year, in preference to any other time, if it be convenient. They are at liberty to elect what studies they will pursue, according to their view of their own wants and attainments.

The Academical year, which commences on Thursday, six weeks after the third Wednesday in July (27 August, 1851,) is divided into two terms, of twenty weeks each, with a vacation of six weeks at the end of each term.

During the winter vacation, the Library will be opened, for the use of those members of the School who may desire it.

The tuition fees are $50 a term, and $25 for half or any smaller fraction of a term; which entitles the student to the use of the College and Law Libraries, and Text Books, and a free admission to all the Public Lectures delivered to undergraduates in the University, comprising Lectures on Anatomy; on Mineralogy and Geology; on the Means of preserving Health; on History; on Rhetoric and Criticism; on Botany; and on Physics and Astronomy.

Students who have pursued their studies for the term of eighteen months in any law institution having legal authority to confer the degree of Bachelor of Laws, oneyear of said term having been spent in this School; or who, having been admitted to the Bar after a year's previous study, have subsequently pursued their studies in this School for one year, are entitled, upon the certificate and recommendation of the Law Faculty, and on payment of all dues to the College, to the degree of Bachelor of Laws.

Prizes are awarded, annually, for dissertations.

Applications for admission may be made to either of the Professors at Cambridge.